88-1159

NO. 88_____

Supreme Court, U.S.
FILED
JAN 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF ARIZONA,

Petitioner,

-vs-

ALEXSANDRO VINCENTE BRAVO,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

CRANE McCLENNEN
Assistant Chief Counsel
(Counsel of Record)
(State Bar No. 003080)

PAUL J. McMURDIE
Assistant Attorney General
(State Bar No. 010386)
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)542-4686

APPENDIX A

[Filed September 20, 1988]

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
En Banc

STATE OF ARIZONA,	)	
	)	Supreme Court
Appellee,	)	No. CR-86-0015-AP
	)	
v.	)	Pima County
	)	Nos. CR-13184
ALEXSANDRO VINCENTE BRAVO,	)	CR-13421
	)	
Appellant.	)	
	)	

Appeal from the Superior Court
of Pima County

The Honorable Gilbert Veliz, Judge

AFFIRMED IN PART, REVERSED IN PART

REMANDED

Robert K. Corbin, Attorney General — Phoenix
By William J. Schafer III
Paul J. McMurdie
Assistant Attorneys General
Attorneys for Appellee

Curtis & Cunningham — Tucson
By George H. Curtis
Attorneys for Appellant

MOELLER, Justice

JURISDICTION

A jury convicted defendant Alexsandro Vincente Bravo of the felony murder of Shang Ngor (Julie) Wong. The same jury, in a joint trial, also found Bravo guilty of armed robbery, aggravated robbery, and aggravated assault committed against Raland Tinker one day before the Wong murder. Defendant was sentenced to three concurrent twelve-year terms on the Tinker convictions and a consecutive term of life imprisonment without possibility of parole for twenty-five years on the Wong murder. He appeals directly to this court. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3); A.R.S. §§ 13-4031, -4033, -4035.

ISSUES

The principal issues we deal with are:

(1) Whether all of defendant's in-custody statements to

investigating officers should have been suppressed on grounds of involuntariness, or whether it was sufficient to suppress those portions taken after the officers continued their interrogation notwithstanding defendant's invocation of his right to remain silent?

(2) Whether the testimony of witness Danny Champion should have been suppressed as fruit of the poisonous tree?

(3) Whether the court properly excluded a hearsay statement of Reynaldo Tapia which tended to implicate a person other than defendant in Wong's murder?

(4) Whether the testimony by a jail counselor and a psychiatrist on the issue of voluntariness violated defendant's rights because the testimony was based, in part, on defendant's exercise of his constitutional rights?

We affirm all of the trial court's rulings except that relating to the Champion testimony, which testimony must be suppressed because it was illegally obtained.

FACTS

A. The Tinker Robbery.

Because of the nature of the issues raised on appeal, we set forth the facts of these interrelated offenses in some detail. On December 12, 1981, Charles Craig's Colt .38 Special was stolen from Tucson's Desert Inn Hotel. Also stolen

were some unusual Federal brand bullets which Craig used in the .38. The next evening, December 13, 1981, Raland Tinker left his room at the La Quinta Motel in Tucson and walked to his Chevy Blazer in the parking lot. Tinker put some items in the back of his Blazer and locked the back part of the Blazer. As he walked around the vehicle to get into the driver's seat, two men came out from between some cars parked nearby and approached him. The first man, holding a gun, said, "This is a holdup. I want your money, your wallet, and this is a real gun." The same man then approached Tinker with the gun held high, partially obscuring his face, and ordered Tinker to lie face down on the ground. Tinker, who was familiar with firearms, thought the gun was either a .32 or .38 caliber Colt. Tinker obeyed, laid down on his

stomach, and removed his wallet from his back pocket and placed it near his head. The wallet contained some credit cards, a Washington state fishing license, and a hidden $50 bill. The second man, who Tinker never saw, checked Tinker's pockets. The first man then struck Tinker on the head with the gun; the gun discharged, sending a bullet into Tinker's midsection.

After the attack, Tinker was taken to a local hospital where he was treated. The bullet removed from his abdomen was preserved for evidence. Although Tinker was shown several photographic lineups by the police shortly after the crime, he was unable to identify the one attacker he had seen. None of the line-ups shown to Tinker contained a picture of the defendant. Tinker described his attacker as a Mexican or Hispanic male between 17

and 19 years old, standing 5'10" and weighing approximately 150 pounds.

B. The Wong Murder.

At approximately 9:00 a.m. on December 14, 1981, the day after the assault and robbery of Tinker, an assailant entered the H&W Market near Tucson High School. The assailant shot and killed Wong, a sixty-seven year old woman who was one of the owners of the store. Police arriving on the scene found Wong, who had been shot through the left eye, laying on the floor near the front counter of the store. A television located in the back of the store was on, as was a sewing machine near it. The drawer to the cash register was open and contained only change. Later, during an autopsy, a bullet lodged in Wong's head was removed and preserved for evidence.

Police connected the Tinker and Wong crimes through ballistics analysis which revealed that the unusual bullets removed from the victims' bodies probably came from the same Colt .38 or .38 special revolver. Analysis also revealed that the fired bullets had characteristics similar to those which had been stolen from Charles Craig at the Tucson Inn. However, no matching gun was ever found.

C. The Defendant's In-Custody Statements.

Nearly two and one-half years later, on April 4, 1984, defendant Bravo was arrested in Benson, Arizona, for attempting to steal a police car in broad daylight. He was incarcerated in the Cochise County jail in Bisbee. While being booked, he was extremely disoriented and it was impossible to communicate with him. As described by one witness, he was "literally bouncing

off the walls." Jail personnel observed Bravo banging his head against jail bars and walls and had to physically restrain him. He openly masturbated continuously, engaged in other public displays of sexual conduct, and asked other inmates for sexual favors.

The jail psychiatrist initially thought defendant's condition was due to acute drug intoxication and decided to let the defendant "dry out." However, defendant's condition did not improve. Therefore, eight days after his arrest, the jail psychiatrist placed defendant on Haldol, a powerful psychotropic medicine. He also prescribed Symmetrel to control the physical side effects of Haldol. The Haldol was administered to make defendant more manageable, to clear his thought processes, and to help defendant communicate. While

defendant's behavior improved somewhat, jail personnel testified that he was still disoriented.

By April 17, 1984, after five days of medication, defendant's abnormal public sexual activity ceased. At approximately noon on that day, defendant asked a detention officer if he could use the jail phone. He made a phone call. Approximately two hours later, he asked to talk to a detention officer. An officer went to defendant's cell where, without any prompting from the officer, defendant told the officer that he had killed an old woman in an armed robbery in Tucson. The officer then asked defendant if he would like to speak to the jail counselor, Nancy Kirkman.

Defendant agreed to speak to Kirkman and was escorted to her office by two officers. According to Kirkman,

defendant was nervous and visibly upset. Defendant told Kirkman that he had "lived with it" long enough and that he needed to confess to a crime. Kirkman told defendant that she had to call a police detective because she could not keep confessions in confidence. She then told defendant that if he desired she would summon a detective. Defendant said that is what he desired. Kirkman then summoned a detective to her office. Before the detective arrived, defendant again told Kirkman that he had murdered a lady in Tucson. While defendant and Kirkman waited for the detective's arrival, Kirkman advised defendant that he should consider exactly what he wanted to tell the detective because it could be used against him.

Detective Martinez, who was stationed in the same building, arrived a short

time later and read defendant his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Kirkman was present during the reading of the Miranda rights and she attempted to explain the meaning of each of the rights to the defendant in terms he could understand. Kirkman took the time to explain the Miranda rights to defendant because her observation of his behavior led her to believe that he might be incapable of understanding his rights. Defendant acknowledged that he understood his rights by either nodding his head or saying "yes."

After Martinez finished reading defendant his rights, defendant became visibly upset and invoked his Miranda rights by saying, "I don't want to say anything now." Martinez honored defendant's invocation of rights and

immediately left the room. However, the defendant shortly thereafter asked Kirkman to summon Martinez again, which she did. Kirkman, after observing defendant exercise his rights, came to believe that he did indeed understand them. When Martinez returned, he again informed defendant of his Miranda rights and Kirkman again explained the rights to defendant. Defendant again acknowledged that he understood his rights.

In an unrecorded conversation, defendant then told Martinez that he had shot an elderly lady, possibly in May 1982, near Tucson High. He thought the name of the store was the "C&W store." Defendant said he shot the lady with a .38 special because she attempted to stop his robbery of the store. Defendant first said he threw the .38 special into the Santa Cruz River and

then said that he had sold it. Martinez then contacted the Tucson Police Department which dispatched homicide Detectives Perry Lowe and Edward Gonzales to Bisbee to talk with defendant.

Lowe and Gonzales, who were introduced to defendant as members of the Tucson Police Department, conducted a tape-recorded interview of the defendant. Lowe and Gonzales interrogated the defendant at length. The resulting statements by the defendant are at the heart of three of the four principal issues in this appeal. Early in the interrogation, defendant implicated himself in both the Wong murder and the theft of the gun from the Desert Inn.

However, after making those incriminating statements, defendant invoked his right to remain silent by

stating, "Well, I don't wanna answer any more questions." The two officers nevertheless continued the interrogation although defendant again immediately asserted that he wanted "no more questions." Detective Lowe later explained his reasons for continuing the question as follows:

> Q. (By Mr. Unklesbay): Is it also true that you continued to ask him questions after that (defendant's invocation of rights)?
>
> A. It is true.
>
> Q. All right. Did you -- did you and Detective Gonzales as well?
>
> A. Yes.
>
> Q. Is there some reason you had for asking those questions of Alex Bravo after he said that he did not want to answer any more questions?
>
> * * *
>
> THE WITNESS (Officer Lowe): Basically, the reason I continued was the brief information that I had received from Mr. Bravo didn't satisfy me that he wasn't lying or making up the story. And to

either clear him as well as anything, I felt I had to talk to him to see if he was fabricating the story.

As I recall the statement, he just said things like "I did it," and didn't get into any detail that couldn't have been figured out by other -- other people that were around the area, either by the news or had been in the store before.

And by continuing the questioning -- and it didn't appear as if he was objecting strenuously -- that I could straighten that out, which I believe I did.

On cross-examination by defense counsel, Officer Lowe elaborated:

Q. (By Mr. Curtis): . . . you're aware of the Miranda decision, aren't you?

A. Yes, I am.

Q. And you're aware that when a person that you're questioning asks that he not answer any more questions, that it's your duty to stop the interview; is that correct?

A. I have been aware of the Miranda decision and the different rulings from different courts and which is admissible and which is

not admissible and when it can be used and when it can't be used.

And I believe -- if I believe that I'm trying to protect everyone's rights and find out what is the truth, I let the judge make that decision.

Q. And at that point you decided not to honor -- you specifically decided, did you not, not to honor his request to stop the interview, correct?

A. I didn't believe when he said "I don't want to answer any more questions," or whatever the exact words were at that particular time, that it meant about everything. It may have been about that particular thing I asked him before.

Q. And so, in -- after two more questions when he said it again that he didn't want to answer any more -- any more questions, you continued to question him, correct?

A. I don't remember the sequence.

At another pretrial hearing, Officer Lowe explained his theory of continuing to question Bravo after he invoked his Miranda rights thusly:

I didn't feel at that particular point there was enough facts to indicate whether he was telling me the absolute truth or not.

I wanted to hear from him some other thing that would verify or refute what he had to say. If he came up with some entirely different thing that couldn't have been happening, I would have said this wasn't the man. And I needed to get a little more information, I felt. So, I went on and talked to him.

I didn't really think he wanted to terminate it as -- just seemed like he just wanted to get off that particular subject at that time.

D. The Witness Danny Champion.

It was only during the interrogation which occurred after defendant invoked his rights that he directly incriminated himself in the La Quinta robbery of Tinker and disclosed the existence of the witness Champion. After acquiring Champion's name from defendant, Detective Lowe went to Champion's home in Tucson within the next few days. Champion was

not home. Lowe left his business card and requested that Champion come to the police station. On May 2, 1984, Champion did come to the police station and was interviewed by Lowe and Gonzales. Although most of the interview was recorded, the first five or ten minutes were not recorded. During that brief period, the detectives and Champion made a deal. The detectives told Champion that they were aware of his participation in the robbery of Tinker at the La Quinta, but that if he would testify against defendant they would not charge him with the La Quinta robbery, so long as he was not the shooter. The detectives also agreed to help Champion out on some unrelated marijuana charges. At trial, Lowe and Gonzales denied Champion's claim that they threatened to "bust his ass" if he failed to cooperate.

At the initial interview with Lowe and Gonzales, Champion denied that defendant had ever told him he had shot and killed someone else. However, after the interview, Champion consulted with counsel. Counsel, in turn, recontacted the detectives and in a statement two weeks after the first one, Champion claimed that he had heard the defendant confess the Wong murder in the presence of one Jerry Galvan.

At trial, Champion provided damning evidence against defendant on both the Tinker and Wong charges. Regarding Tinker, he testified that he and defendant robbed him on December 13, 1981, because defendant just decided to rob someone that day. Champion, armed with a .22, said he accompanied defendant, who carried a .38 Smith & Wesson, over to the La Quinta Inn.

Champion stated that they saw a man leave his hotel room and walk out to his truck. According to Champion, Bravo approached the man and forced him to lay on the ground. Champion identified Tinker as the man who he and Bravo had robbed. Champion claimed that when the defendant attempted to strike Tinker on the head with his gun, he, Champion, the good samaritan, tried to stop defendant by putting his arm between the gun and Tinker's head, but that the gun went off. Champion said that the wallet contained no money, some credit cards and a fishing license from Washington. On the Wong murder charge, Champion testified that he had heard defendant confess the Wong murder to Jerry Galvan.

VOLUNTARINESS OF DEFENDANT'S STATEMENTS

Before trial, defendant moved to suppress all of his April 17 Cochise

County jail statements as involuntary. The trial court suppressed only the portion of his taped statement made after defendant invoked his Miranda rights. The state did not object to that suppression order at trial and does not here. The trial court refused to suppress the other statements, finding that they were voluntary. Basically, defendant contends that his statements and his initial waiver of Miranda rights were involuntary by reason of his mental condition and the effect of the medication he was taking. The trial court held an extensive evidentiary hearing and found the statements and the waiver to be voluntary.[1]

---

[1] In a later section of this opinion, we deal with the propriety of permitting testimony at the suppression hearing to be based, in part, on defendant's invocation of constitutional rights.

The expert witnesses at the suppression hearing all agreed that defendant suffered from a mental illness, although they did not agree upon the nature of the illness or its effect upon defendant's ability to appreciate his constitutional rights. Some experts testified that the Haldol defendant was taking improved his ability to think by slowing his otherwise confused thought processes.

After carefully considering all the evidence, the trial court found the statements to be voluntary. In doing so, the trial court relied heavily on its own evaluation of the taped statement and placed little weight on defendant's involuntary movements during the interview, finding that those movements were a side effect of Haldol not affecting defendant's ability to understand the questions. In accordance

with Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), the issue of voluntariness was also submitted to the jury following the trial court's pretrial preliminary determination.

Confessions are prima facie involuntary and the state must show by a preponderance of the evidence that a confession was freely and voluntarily given. State v. Thomas, 148 Ariz. 225, 714 P.2d 395 (1986). Mental illness alone will not preclude the admission of an otherwise voluntary confession unless the illness renders the declarant unable to understand the meaning of the statements made. State v. Porter, 122 Ariz. 453, 456, 595 P.2d 998, 1001 (1979). Once the trial court has properly considered all the circumstances surrounding an interrogation, the trial court's determination that a confession

was voluntary will not be disturbed on appeal absent clear and manifest error. State v. Graham, 135 Ariz. 209, 211, 660 P.2d 460, 462 (1983).

In evaluating defendant's present claim, the recent Supreme Court case of Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), is most instructive. Connelly approached a police officer in downtown Denver and announced that he had murdered someone. The officer immediately advised him of his Miranda rights, but Connelly confessed anyway "because his conscience had been bothering him." Connelly proceeded to provide details of the homicide to several officers in a coherent fashion, enabling the officers to link Connelly's confession to a previously unsolved murder. The following night, while in custody,

Connelly became disoriented, began hearing voices, and stated that the voices had directed him to confess. He was initially found incompetent to stand trial, but was found competent in an evaluation conducted several months later.

At a suppression hearing, a psychiatrist described Connelly as suffering from chronic schizophrenia and as being in a psychotic state the day he confessed. The trial court suppressed the confession as involuntary. The Colorado Supreme Court affirmed, stating that "the ultimate test of voluntariness is whether the statement was the product of a rational intellect and a free will." People v. Connelly, 702 P.2d 722, 728 (Colo. 1985).

The United States Supreme Court reversed. According to the Court, the Supreme Court of Colorado failed to

recognize "the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." 479 U.S. at __, 107 S. Ct. at 521, 93 L. Ed. 2d at 483. The Court specifically rejected an inquiry into a defendant's motivation for speaking or acting as he did when the defendant does not claim that governmental conduct coerced the confession. The Court squarely held "that coercive police activity is a necessary predicate to the finding that a 'confession' is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment." 479 U.S. at ___, 107 S. Ct. at 522, 93 L. Ed. 2d at 484.[2]

---

[2]The defendant here has asserted only federal constitutional grounds in support of his suppression argument.

In the instant case, there is absolutely nothing in the record demonstrating any coercive police tactics insofar as the unsuppressed statements are concerned. See also State v. Carrillo, 156 Ariz. 125, 134-137, 750 P.2d 883, 892-95 (1988) (following Connelly).

Nor can defendant prevail by claiming that his waiver of Miranda was involuntary. In Connelly the Supreme Court rejected the same argument:

> There is obviously no reason to require more in the way of a "voluntariness" inquiry in the Miranda waiver context than in the Fourteenth Amendment confession context. The sole concern of the Fifth Amendment on which Miranda was based, is governmental coercion. . . . The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on free choice in any broader sense of the word. . . .

479 U.S. at ___, 107 S. Ct. at 523, 93 L. Ed. 2d at 486.

Despite the similarities between Connelly and this case, there is one significant difference. In this case, defendant alleges that the state's decision to treat him with a powerful psychotropic medicine rendered his statements involuntary. The power of Haldol is undisputed, and there is a potential for abuse of medications in questioning prisoners. However, it is clear that in this case, the medication was prescribed for wholly legitimate purposes. Neither the jailers nor the doctor prescribing the Haldol had any idea at all that defendant may have been involved in serious crimes unrelated to the relatively minor one for which he was in custody. No questioning was even contemplated.

The Haldol was prescribed for a proper purpose and it did not, in fact, produce

either an involuntary confession or an involuntary Miranda waiver. Jails and prisons must necessarily provide proper medical treatment for prisoners. Indeed, statements obtained from prisoners deprived of proper medical treatment may sometimes be considered coercive. See Greenwald v. Wisconsin, 390 U.S. 519, 522, 88 S. Ct. 1152, 1154, 20 L. Ed. 2d 77, 79 (1968) (suspect's statements involuntary in part because he was interrogated without access to his high blood pressure medication); Sloan v. Estelle, 710 F.2d 229, 232-33 (5th Cir. 1983), cert. denied, 464 U.S. 1048 (1984) (defendant unsuccessfully argued that confession was coerced because he was denied access to his medication for bronchial asthma).

Our previous case law has held that if a defendant was so intoxicated that he

could not understand the meaning of his statements, then the statements were involuntary. State v. Laffoon, 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980). In State v. Clabourne, we held that the test for voluntariness when a defendant is under the influence of narcotics or mental disabilities is whether the condition renders him unable to understand the meaning of his statement. 142 Ariz. 335, 342, 690 P.2d 54, 61 (1984). The trial court looks to the totality of the circumstances to determine whether the accused was able to reason, comprehend, or resist. State v. Laffoon, 125 Ariz. at 487, 610 P.2d at 1048. However, after Connelly and Carrillo, the question of voluntariness, for purposes of the federal constitution, must focus on police conduct, and not solely on the mental state of the

defendant. State v. Tucker, No. 6711, slip op. at 29 (Ariz. Sup. Ct. June 2, 1988) (finding that an intoxicated defendant's statements were voluntary within the meaning of the due process clause of the fourteenth amendment and were not obtained in violation of his fifth amendment rights).

Like the trial court, we have listened to the taped portions of the statements and have reviewed all of the other evidence which was before the trial court on the issue of voluntariness. There is ample evidence to support the trial court's finding.

ADMISSIBILITY OF CHAMPION'S TESTIMONY

We have previously set forth at some length the circumstances concerning the continued interrogation of defendant after he invoked his Miranda rights. It was during this interrogation that the

officers first learned of the witness Champion who had not surfaced as a witness in the two and one-half years since the La Quinta robbery and the Wong murder. The detectives immediately attempted to contact Champion. When they did so, they made a deal with him by which he would testify against defendant on the La Quinta robbery in return for immunity on the La Quinta crimes and "help" on some other unrelated offenses. Upon further reflection and after consulting with an attorney, Champion also provided the police with evidence of defendant's purported confession to the Wong murder as well, although he denied any such knowledge at the time of his first interview with the police.

Defendant moved to exclude Champion's testimony as "fruit of the poisonous tree," pursuant to Wong Sun v. United

States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The issue is whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint'" of the violation. Id. at 487, 83 S. Ct. at 417, 9 L. Ed. 2d at 457.

The critical case in the resolution of this issue is United States v. Ceccolini, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978). In Ceccolini a policeman on his lunch break visited a flower shop and began conversing with an employee who was also his friend. During the conversation, the officer noticed an envelope and, after examining the envelope, discovered evidence of a gambling operation. The officer asked the employee who owned the envelope. The

employee told the officer that the envelope belonged to Ceccolini.

Coincidentally, the FBI had been conducting an ongoing investigation into gambling in the area and the flower shop had been under surveillance for some time. As a result, the identity of Ceccolini and the employee were already known to the FBI. The officer's supervisor notified the FBI. Four months later, the FBI interviewed the employee. The employee told the agent that she was studying police science in college and was willing to testify against Ceccolini. She did and Ceccolini was convicted of perjury. He challenged the admissibility of her testimony on the grounds that it was the fruit of an illegal search.

The Supreme Court held that the employee's testimony was properly

admitted despite the causal connection between the illegal search and the testimony. The Court went beyond the preexisting "independent source" and "inevitable discovery" exceptions to the exclusionary rule in order to admit the testimony. The Court also distinguished between physical evidence and live witnesses:

> Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of initial questioning of the witness may be such that any statements are truly the product of detached reflection and desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful

part in the witness' willingness to testify.

Id. at 276-77, 98 S. Ct. at 1060, 55 L. Ed. 2d at 277.

Additionally, the Court noted that there can be great injury to the public when an eligible witness is precluded from testifying. "Rules which disqualify knowledgeable witnesses from testifying at trial are . . . 'serious obstructions to the ascertainment of truth' . . . ." Id. at 277, 98 S. Ct. at 1061, 55 L. Ed. 2d at 278 (citing C. McCormick, Law of Evidence § 71 (1954)).

In Ceccolini the Court concluded that the following factors militated toward admitting the employee's testimony: the witness' willingness to testify, the time lapse between the illegal search and the initial contact with the witness, the subsequent time lapse between the contact with the witness and the witness'

testimony, the independent and preexisting surveillance of the flower shop by the FBI, and the absence of any intent by the officer to find evidence of an illegal gambling operation. 435 U.S. at 279-80, 98 S. Ct. at 1062, 55 L. Ed. 2d at 279.

The principles of Ceccolini have evolved into a four-factor test to be used to determine the admissibility of tainted live-witness testimony: (1) the willingness of the witness to testify; (2) the role played by the illegally seized evidence in gaining the witness' cooperation; (3) the proximity between the illegal behavior, the witness' decision to cooperate and the actual testimony at trial; and (4) the police motivation in conducting the search. United States v. Hooton, 662 F.2d 628, 632 (9th Cir. 1981), cert. denied, 455

U.S. 1004 (1982) (citing United States v. Leonardi, 623 F.2d 746, 752 (2nd Cir.), cert. denied, 447 U.S. 928 (1980)).

In this case the trial court concluded that three of the four factors favored the state, and that the testimony of Champion was admissible. We disagree and hold that Champion's testimony must be excluded.

A. Police Motivation

In weighing the factor of police motivation (to take the last factor first), we believe it is appropriate to look at the extent and nature of the violation. The illegality in Ceccolini was virtually accidental when compared to the violation in this case. The officers in this case were experienced homicide detectives from a large metropolitan police force. They were thoroughly familiar with Miranda. Miranda is clear:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.

384 U.S. at 473-74, 86 S. Ct. at 627, ___ L. Ed. 2d at ___ (emphasis added.)

The suspect's right to cut off questioning must be "scrupulously honored." State v. Hatton, 116 Ariz. 142, 146, 568 P.2d 1040, 1044 (1977); see also Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). The violation in this case did not occur in any mirky, ill-defined area of law where reasonable persons could differ on Miranda application. This was a clear violation of black letter Miranda law known to all qualified police officers.

The excuses offered by the officers for continuing the questioning after the defendant invoked his rights are

frivolous. If the United States Supreme Court had intended that in-custody interrogation of prisoners could be conducted and continued solely at the discretion of the interrogating officer, it would not have promulgated the Miranda rule. For the officers to contend that they may continue questioning after the defendant's invocation of rights for the purpose of trying to exonerate him is merely the flip side of their contending that they may continue questioning him to see whether his answers fail to exonerate him, i.e., to see whether his answers incriminate him.

Our review of the tape and of the transcript of defendant's interview with the detectives indisputably reveals that the police were actively searching for information and for witnesses. The following passage is but one example

demonstrating the frivolity of the present claim that the officers were simply attempting to see whether defendant was falsely confessing to the Wong murder:

Lowe: . . . Do you remember being over at La Quinta and robbing a man there?

Bravo: No. I didn't do that.

Lowe: You didn't do that.

Bravo: Uh-um.

Lowe: What if I told you the same gun that [sic] was used in the La Quinta shooting was the same gun that shot the old lady?

Bravo: What's La Quinta? . . . .

Lowe: I'd kind of like to know about the night before you did this? [the murder] . . . .

Bravo: I don't remember. Why would I remember the night before?

Lowe: Because you should remember everything before or after. A time period that . . .

Bravo: I guess I do.

Lowe: You think you do?

Bravo: Because I was in La Quinta, too. I did that, too.

Finally, the police obtained Danny Champion's name by asking a specific question which falls outside their purported rationale for continuing the interview after Bravo's invocation of his Miranda rights. When they asked defendant "[w]ho was with you [during the robbery]?" and elicited Danny Champion's name, they were not confirming anything, but were instead seeking new information.

The Supreme Court approved of the eyewitness testimony in Ceccolini in part because "[t]here is, in addition, not the slightest evidence to suggest that Biro [the officer] entered [the premises] . . . with the intent of finding tangible evidence . . . much less any suggestion

that he entered the [premises] . . . with the intent of finding a willing and knowledgeable witness. . . ." 435 U.S. at 279-88, 98 S. Ct. at 1062, 55 L. Ed. 2d at 279. Indeed, the Ceccolini decision stated: "Of course, the analysis might be different where the search was conducted by the police for the specific purpose of discovering potential witnesses." Id. at 276 n.4, 98 S. Ct. at 1060 n.4, 55 L. Ed. 2d at 277 n.4 (emphasis added).

The police in this case did exactly what the Supreme Court suggested would have been improper for the officer involved in Ceccolini to do. They were attempting to find witnesses when they violated the defendant's Miranda rights.

The stated philosophy of the detectives was to ignore the requirements of Miranda and to let the courts sort it all out later. The state is ill-served by such

disregard for the law, and this case and the resulting reversal is a prime example of such ill-service. The factor of police motivation strongly militates in favor of exclusion.

B. Time Lapse

In considering the factor of time lapse, the trial court found that the length of time between the illegal behavior of the police, the witness' decision to cooperate, and the actual testimony at trial went in favor of the state. These three factors had been considered in Ceccolini to determine if the testimony given by the witness was an act of free will. 435 U.S. at 279-80, 98 S. Ct. at 1062, 55 L. Ed. 2d at 279.

The trial court found that the eighteen months between the "behavior of the police officer" and Champion's actual trial testimony placed the time lapse factor on the side of the state. Given

the circumstances of this case, we believe that the trial court applied this factor too mechanically. In Ceccolini, the Court noted that "[s]ubstantial periods of time elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the latter and the testimony at trial on the other." Id. The Ceccolini court found these lapses of time to be significant because the witness maintained a willingness to testify despite an opportunity to back out.

However, an examination of the time periods involved in this case, we believe, indicates that the time lapse factor favors exclusion. As for the first time period, the police contacted Champion immediately following their illegal interview with the defendant. As for the second time period, it is true

there was an eighteen-month gap between Champion's initial police interview and his trial testimony. But as soon as Champion cut a deal with the police (a mere two weeks after the Miranda violation), he opened himself up to significant harm if he refused to testify. If he did not keep his end of the agreement by being a cooperative witness, the state would prosecute him for the La Quinta robbery and would also refuse to help him on his outstanding marijuana charges. As a matter of fact, his marijuana charges were still pending when he gave his trial testimony. In effect, Champion had no real opportunity to back out once he made his deal without suffering extremely adverse personal consequences.

Under these circumstances, the eighteen-month period is of little significance because, unlike the witness

in Ceccolini, it did not indicate that Champion had a long-term willingness to testify. Indeed, the record indicates he was demonstrably reluctant to testify at trial.

At trial Champion intimated that he felt forced to testify. His hostility while testifying ultimately led to the prosecutor stating:

> I would ask for leave to use leading questions with Mr. Champion, because I think especially after his testimony yesterday, he's a hostile witness. He's not a state's witness. He's accused the state of threatening him with his -- with, quote: " busting my ass." I submit he's hardly a fully cooperative state's witness. . . So I would ask leave to ask leading questions, and I think that would solve the problem.

Here the time-lapse factor favors exclusion.

C. Role of Unlawful Interrogation

The third factor which the court considered in Ceccolini was the

connection between the illegally-obtained evidence and the role it played in gaining the witness' cooperation. The trial court properly found that this factor cut against the state. The plain fact is that, two and one-half years after the crimes, the police didn't have a clue that Champion was a potential witness in either the Wong or Tinker cases. The identity of Champion came solely and exclusively from the illegal questioning and the state never would have found Danny Champion without it. In Ceccolini, on the other hand, the Court noted that both the identity of the witness and her relationship with the defendant were well known by the police prior to any police impropriety. 435 U.S. at 279, 98 S. Ct. at 1062, 55 L. Ed. 2d at 279.

At least two courts have excluded live witness testimony in cases where the identity of the witness was completely

unknown to the police before the misconduct. In United States v. Scios, 590 F.2d 956, 963 (D.C. Cir. 1978), the court excluded the testimony because "Massa's existence as a potential witness was entirely unknown to the authorities before they searched Scios's files." In Commonwealth v. Lahti, 398 Mass. 829, 501 N.E.2d 511 (1986), cert. denied, ____ U.S. _ _, 107 S. Ct. 1895 (1987), the court approved the exclusion of testimony where the police engaged in misconduct designed to discover witnesses apparently unknown to them. Because the unlawful interrogation led directly to the witness Champion and he would not otherwise have been discovered, this third factor weighs heavily in favor of exclusion.

D. Willingness of Witness to Testify

The trial court found that the final factor -- the alleged willingness of the

witness to testify -- weighed in favor of the state. This factor may be the most difficult of the four to evaluate and has been subject to disparate interpretations by state and federal courts.

The Court's application of the willingness-to-testify standard was straightforward in Ceccolini. The witness in Ceccolini was not a suspect in the case, she was studying police science, and she had an affirmative interest in testifying. We do not think that Champion, who was summoned from the streets some two and one-half years after the crimes in question, and who was immediately told that the police were aware of his participation in the La Quinta robbery, can be said to have made statements which were "truly the product of detached reflection and a desire to be cooperative on the part of

the witness." 435 U.S. at 277, 98 S. Ct. at 1060, 55 L. Ed. 2d at 277. He clearly testified to avoid prosecution on the La Quinta robbery and on his outstanding marijuana charges.

We do, however, recognize that Ceccolini is not limited to cases involving "good-citizen" witnesses. See, e.g., United States v. Schaefer, 691 F.2d 639 (3d Cir. 1982) (witness' decision to testify was a voluntary decision to promote his own interests with respect to sentencing); see also Hooton, 662 F.2d 628 (Ceccolini not limited to good-citizen witnesses testifying out of civic duty); Leonardi, 623 F.2d 746 (permitting testimony of unindicted co-conspirator); United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980) (testimony was in no way coerced although partially induced by grant of immunity);

United States v. Stevens, 612 F.2d 1226 (10th Cir. 1979), cert. denied, 447 U.S. 921 (1980) (fact that testimony of an accomplice came as part of a plea bargain into which the accomplice entered did not diminish volition of his coming forward to implicate defendant); People v. Briggs, 709 P.2d 911 (Colo. 1985) (describing distinction between coerced and voluntary immunized testimony).

However, what the Supreme Court focused on in Ceccolini was the presence of realistic options. The witness in Ceccolini had the option not to testify and yet she still chose to do so many months later. Here, Champion had no realistic options. He arrived at the police station and was confronted with the officers' accusations. They explained to him that if he agreed to cooperate and testify they would agree

not to charge him with the La Quinta crimes and would also help him in his pending marijuana charges. Obviously, the implication is that he will be prosecuted if he doesn't testify. The trial court stated that Champion's deal and resulting testimony were voluntary because the officers did not have probable cause to arrest Champion. They did, of course, have defendant's statement (albeit illegally obtained) implicating Champion in the La Quinta robbery. More importantly, Champion was not under the impression the police could not arrest him. Throughout, he maintained that they threatened to do just that if he did not cooperate.

In United States v. Scios the court said:

> In the present case, it is plain that Massa's giving of testimony -- before the grand jury, and presumably at the trial -- is

> purely and simply a product of coercion. Massa's decision to testify is not a matter of choice, or free will, but made solely to avoid being jailed for contempt. His decision to testify in such circumstances can hardly be what Judge Burger had in mind in Smith and Bowden when he spoke of the "human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give."

590 F.2d 956, 961 (D.C. Cir. 1978) (citations omitted).

Champion's testimony here is similarly coerced. Obviously, he was initially unwilling to testify -- for two and one-half years he had not felt the urge to step forward and confess. At the station he was told that the police knew of his participation in the La Quinta robbery. From the questions during his interview, he could not have been unaware that there was an ongoing homicide investigation and that he was quite possibly a suspect in it. He could avoid

being charged for the La Quinta robbery and get help on his unrelated marijuana charges only if he agreed to testify.

The state makes much of the two-week period between the time the deal was made and the second interview, claiming the time span is evidence that Champion's testimony was the product of his free will. We disagree. The two interrogations are interrelated. A review of the transcript of the first interrogation reveals that the two homicide detectives were clearly interested in the Wong murder. They repeatedly asked Champion about his activities the day of the murder. His return two weeks later, after consultation with his attorney, to relate defendant's alleged confession to the Wong murder is intrinsically linked to the coercion exerted upon him at the first interrogation.

In short, under the circumstances of this case, all four Ceccolini factors favor the suppression of Champion's testimony because it is the direct result of illegal police activity and it is not sufficiently attenuated to be otherwise admissible.

ADMISSIBILITY OF REYNALDO TAPIA'S STATEMENTS

At trial, defendant sought to blame both the Wong murder and the La Quinta robbery on one Frank Martinez. Martinez testified and denied any involvement in either of the crimes. Another witness, Johnny Urias, testified that Martinez had admitted that he had committed the La Quinta robbery and had shot a Chinese lady (presumably Mrs. Wong). Defendant sought to have another witness, Reynaldo Tapia, testify similarly to Urias, but Tapia invoked the fifth amendment.

Defendant then sought to introduce a tape-recorded statement that Tapia had given to the police. In the statement, Tapia claimed that he and Martinez were sniffing glue in a park when Martinez left to rob "that Chinese store" and returned "about one and one-half hours later . . . breathing hard and very tired and started telling everyone there that he shot the lady at the store."

On appeal, defendant initially claims that the trial court erred in sustaining Tapia's claim of fifth amendment privilege. Because defendant never objected to Tapia's invocation of the privilege in the trial court, that issue is waived on appeal. Rule 103(a), Ariz. R. Evid. 17A A.R.S.; see generally State v. Thomas, 130 Ariz. 432, 435, 636 P.2d 1214, 1217 (1981). If Tapia successfully claims the privilege at a retrial,

however, the admissibility of his statement may again be an issue so we deal with it now.

The defendant urges the admissibility of Tapia's statement under Rule 804(b)(5), Ariz. R. Evid. -- the residual hearsay exception for unavailable witnesses.[3] Rule 804(b)(5) allows hearsay evidence to be admitted if it possesses adequate circumstantial guarantees of trustworthiness, is evidence of a material fact, and if justice would be served by its admission. State v. Smith, 138 Ariz. 79,

---

[3]We note that Rule 804(b)(3) specifically relates to statements against interest where the declarant is unavailable and may impose a more stringent standard of corroboration than does Rule 804(b)(5) when the statement against criminal interest is being offered to exculpate an accused. However, as noted, both in the trial court and here, the statement has been offered, and the legal issue presented, solely under Rule 804(b)(5), so we deal with it as such.

84, 673 P.2d 17, 22 (1983), cert. denied, 465 U.S. 1074 (1984). The statement must be both strongly probative and circumstantially reliable. See State v. Ramirez, 142 Ariz. 171, 177, 688 P.2d 1063, 1069 (App. 1984).

In State v. Robles, 135 Ariz. 92, 659 P.2d 645 (1983), this court rejected a mechanical approach to Rule 804(b)(5) and held that a trial court should examine each case individually by analyzing a number of factors including:

1. The presence of oath or cross-examination.

2. The ability of the declarant to perceive clearly.

3. The amount of time between the event and the declaration.

4. The presence of corroborative evidence.

5. The self-incriminatory nature of the declaration.

6. Whether the declaration was unambiguous and explicit.

7. Whether multiple levels of hearsay are involved.

Id. at 95, 659 P.2d at 648.

The trial court complied with Robles and made the following individualized findings and observations concerning the proffered testimony, which we summarize as follows:

1. No presence of cross-examination in the prior interview.

2. The time between the alleged confession and the crime was short, weighing for the defense.

3. While there was corroboration due to the fact that appellant had presented another witness who also testified that Martinez had confessed to him; the fact that Tapia's statement was not against his own interest and that he incriminated Martinez in his own murder case rendered the third factor neutral for either side.

4. The witness' statement, while initially unambiguous, was retracted somewhat in interviews with the prosecution.

5. That there are multiple levels of hearsay as appellant offered to introduce what the police said Tapia said Martinez said.

The trial court then noted the unique unreliability of the proffered evidence:

> So, that's, you know -- and then ultimately the thing that strikes me as peculiar in this case is that unique situation where Tapia is now labeling Martinez as the killer in a case where he's charged with first-degree murder.
>
> And that places a whole difficult aspect of evaluation that should be inquired by the jury, and which can't be inquired by the jury if he takes the Fifth amendment.
>
> So, under all those circumstances, it seems to me very difficult so say "Well, it's fair to bring all this evidence in, you know; it's such a -- so close on the line.
>
> But that aspect to me is so important that the jury should be able to determine, you know, something of this nature. Until he takes the Fifth they don't know, you know, that he's named Martinez as a killer in another matter. Is he amplifying his -- his case by testifying that Martinez was a killer in another case also?

> Well, you say "No, that's not true because he made this statement originally in '82, and this happens in '84."
>
> * * *
>
> It leads to such collateral issues that the probative value at a certain point becomes questionable, specifically since we've already got before the jury that Martinez told the gentleman yesterday that he had shot a Chinese woman and that he had been involved in -- I also don't remember -- the La Quinta robbery was also mentioned. I can't remember if he specifically said that.
>
> So, we've already got the statement from Martinez through this other witness who had none of these complications that in fact that this had occurred.
>
> So, I think that under that analysis, the motion to permit all the evidence, that hearsay evidence pursuant to that rule is denied.

This is exactly the type of analysis, tailored to the individual case, that is required by Robles. Exclusion of this type of evidence by the trial court will not be disturbed on appeal absent a clear

abuse of discretion. Robles. There was no such abuse of discretion so we affirm the decision of the trial court.

TESTIMONY BY THE STATE'S WITNESSES ON VOLUNTARINESS

Defendant argues that his rights were violated by the manner in which the state's experts testified both at the pretrial motion to suppress and at trial. At the time of the suppression hearing, Nancy Kirkman, a counselor for the Chochise County jail, testified regarding the events surrounding Bravo's statements. Kirkman used defendant's initial invocation of his right to remain silent as some evidence that the defendant's statements were voluntary. At the same hearing, Edward Gelardin, a physician specializing in psychiatry who twice evaluated Bravo for competency, also testified. In support of his opinion, he relied on the fact that

defendant invoked his right to remain silent as well as on that portion of the statement obtained in violation of Miranda. Gelardin did not specifically mention any particular portion of the suppressed statement. At trial, Gelardin also testified that defendant's responses to questions from Detectives Lowe and Gonzales were rational and coherent.

Defendant claims that the trial judge erred in permitting the witness to use his Miranda rights invocation as a partial basis for their opinions. Arizona courts have recognized that protection against self-incrimination includes freedom from adverse consequences flowing from defendant's exercise of his fifth amendment rights. State v. Carrillo, 156 Ariz. 125, 750 P.2d 883 (1988). Normally, any reference by a judge or a prosecutor about a defendant's protected silence will

constitute fundamental error. State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973). Miranda warnings carry an implicit assurance that a defendant's choice to remain silent will carry no penalties. Carrillo, 156 Ariz. at 134, 750 P.2d at 887 (citing Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 96 (1976)). Having said that, we find it helpful to discuss the pretrial and trial proceedings separately.

A. Pretrial Testimony

At the pretrial motion to suppress Kirkman testified as follows:

> THE PROSECUTOR: Now, in terms of Mr. Bravo, and in terms of his behavior, emotional state at the time that you were speaking to him in your office, did you believe that Mr. Bravo was understanding what was being said to him and understanding what he was saying?
> . . .
>
> THE WITNESS: Initially, I wasn't sure whether or not Alex was understanding.

I was convinced that he did understand at the point in which he became -- well, I don't know if he became frightened or not. The point at which he decided not to talk to Frank Martinez appeared in reaction to what I had been telling him, that it indeed was a very serious thing, that he was about to tell the detective, that it could be used against him.

And he appeared aware of that and that's what changed his mind.

And I think at that point I became convinced that Alex did know that, that he did understand.

Dr. Gelardin testified at the pretrial voluntariness hearing as follows:

And then, as I understand it, after he's read his rights, he has some brief second thoughts and -- which is kind of a rational response one might expect to hearing one's rights; it reminds you of all the trouble you may be in later.

And so, he -- the fact that he has some second thoughts, and I feel like he barely presumes that was the basis of his second thoughts, so that interaction to me is important.

If such evidence were presented to a jury as evidence of defendant's

consciousness of guilt or of his sanity, it would be error. The first use is prohibited by Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), and the second is prohibited by Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986). However, Bravo claims that his confession and his initial waiver of Miranda rights were involuntary because of his mental condition and because of the medication. We recently held that neither Doyle nor Wainwright forbids the evidentiary use of a defendant's invocation of his Miranda rights to rebut defendant's contention that he did not understand his rights. In Carrillo we said:

> [W]e believe there are limits on how far an accused may stretch the Wainwright principle. It strains reality to hold that a defendant may invoke Miranda to stop further questioning and later freely argue that contemporaneous admissions were involuntary because he could not assert his Miranda rights. We

> do not penalize defendant for exercising his Miranda rights. We do not believe the implicit promise of freedom from penalty recognized in Doyle and Wainwright embraces the concept that defendant may simultaneously claim his rights and, without fear of contradiction, claim he did not understand the rights he claimed. We hold that evidence of exercise of Miranda rights was admissible on the question of comprehension of those rights.

Carrillo, 156 Ariz. at 131-32, 750 P.2d at 889-90.

Additionally, in Carrillo, we held that in order for a waiver of Miranda rights to be voluntary, a defendant must understand his rights and intend to waive them and that the decision to waive must not have been compelled by governmental impropriety. We held that a trial court's finding that a mentally retarded defendant made a knowing and intelligent waiver of his Miranda rights was supported by the interrogating officer's testimony that defendant actually

understood his rights, and by a police psychologist's testimony that defendant understood the Miranda warnings. Just as in this case, the psychologist in Carrillo based his opinion in part on the defendant's exercise of his constitutional rights during an interrogation. 156 Ariz. at 130, 750 P.2d at 888. There was no error in the receipt of the experts' opinions on voluntariness at the pretrial motion to suppress.

B. Trial Testimony

Before Dr. Gelardin testified at trial, the trial court carefully instructed him to avoid any reference to the suppressed portion of the confession and to discuss only his conclusions from studying the confession. This approach, suggested by the trial court, was approved in Wainwright. In Wainwright, the state argued to the Court that post-Miranda

silence is vital evidence of a defendant's sanity and therefore should be admissible. 474 U.S. at ___, 106 S. Ct. at 640, 88 L. Ed. 2d at 631-32. The Court acknowledged that the state had a legitimate interest in proving defendant's rationality. The Court suggested that that interest could be constitutionally fulfilled "by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel." 474 U.S. at ___, 106 S. Ct. at 640, 88 L. Ed. 2d at 632.

We believe that the trial court's control over Gelardin's testimony kept his testimony within constitutional bounds. Moreover, Rule 703, Arizona Rules of Evidence, provides that an expert may base an opinion on facts or data which "need not be admissible in evidence." State v. Mauro, 149 Ariz. 24,

32, 716 P.2d 393, 401 (1986), rev'd on other grounds, ____ U.S. ____, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987). The expert is also not precluded from using evidence even if the evidence is suppressed by the trial court. State v. Mitchell, 106 Ariz. 492, 497, 478 P.2d 517, 522 (1978). Gelardin did not mention the suppressed confession or defendant's invocation of his rights; therefore his testimony did not violate any constitutional right of defendant.[4]

CONCLUSION AND DISPOSITION

The trial court's ruling concerning the admissibility of the non-suppressed

---

[4]In a portion of the prosecution's final argument to the jury, the prosecutor arguably refers to the defendant's invocation of rights. In fact, no such evidence was before the jury. For the first time in his reply brief, the defendant claims error by reason of the prosecutor's argument. Since we are remanding for other reasons and have no reason to believe the misstatement will be repeated, we do not deal with it further.

portions of the defendant's statements is affirmed, as is its ruling excluding the Tapia statement. There was no error in the receipt of the Gelardin and Kirkman testimony at the suppression hearing or at the trial. However, the failure of the police to honor defendant's Miranda rights require the suppression of the Champion testimony. Defendant's convictions are reversed and this cause is remanded to the trial court for a new trial in accordance with this opinion.[5]

---

[5] In making this remand, we are mindful that the felony murder conviction is apparently based on a jury finding that defendant attempted an armed robbery of Mrs. Wong and that the jury found defendant not guilty of a completed armed robbery of Mrs. Wong. We are also mindful that no lesser-included offense instruction was given on attempted armed robbery. We have no way of knowing how the parties may elect to proceed hereafter. We caution the parties that the order of remand herein should not be read as impliedly deciding any legal issues other than those expressly resolved in this opinion.

JAMES MOELLER, Justice

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

STANLEY G. FELDMAN, Vice Chief Justice

JAMES DUKE CAMERON, Justice

WILLIAM A. HOLOHAN, Justice

APPENDIX B

MOTION FOR RECONSIDERATION

IN THE SUPREME COURT

OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, -vs- ALEXSANDRO VINCENTE BRAVO, Appellant.	)	No. CR-86-0015-AP (Pima County Superior Court Cause Nos. CR-13184 and CR-13421) MOTION FOR RECONSIDERATION

The State of Arizona hereby moves this Court to reconsider the opinion rendered on September 30, 1988, for the reasons stated in the following Memorandum of Points and Authorities.

DATED this 5th day of October, 1988.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

/S/ Crane McClennen for

PAUL J. McMURDIE
Assistant Attorney General
Criminal Division
Department of Law

1275 W. Washington, 1st Floor
Phoenix, Arizona 85007
Telephone: (602)255-4686
(State Bar Membership
No. 010386)

Attorneys for APPELLEE

MEMORANDUM OF POINTS AND AUTHORITIES

Appellee believes the Court's opinion, dated September 30, 1988, is in error based on the following:

A. The United States Supreme Court has held that evidence derived from a Miranda violation is not to be suppressed; therefore, this Court erred by holding to the contrary.

In this Court, appellant argued that his statements made to the police were involuntary and therefore in violation of the Fifth Amendment. State v. Bravo, No. CR-86-0015-AP, slip op. at 12-17 (Ariz.Sup.Ct., Sept. 20, 1988). This Court properly rejected this contention. Id. at 17. Appellant likewise argued that the use of the testimony of Danny Champion, whose identity was learned by

the police in violation of Miranda, was in violation of the Fifth Amendment and should have been suppressed. (Opening Brief at 13-18.) This Court held that, because Champion's identity was learned through a Miranda violation, Champion's testimony must be suppressed as a "fruit of the poisonous tree" because there was insufficient evidence to "dissipate the taint." Id., slip op. at 17-30. The Court is in error in this holding as the "fruit of the poisonous tree" doctrine does not apply to Miranda violations. Oregon v. Elstad, 470 U.S. 298, 305-08 (1985); Michigan v. Tucker, 417 U.S. 433, 446 (1974).

In Michigan v. Tucker, supra, the Court was asked to extend the fruit of the poisonous tree doctrine of Wong Sun v. United States, 371 U.S. 471 (1963), to suppress the testimony of a witness for

the prosecution whose identity was discovered as the result of a statement taken from the accused in violation of Miranda. Michigan v. Tucker, supra, 417 U.S. at 446-47. The Court rejected the argument holding that, because there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in Wong Sun that fruits of a constitutional violation must be suppressed. Id., 417 U.S. at 451-52.

The United States Supreme Court affirmed the Michigan v. Tucker analysis in Oregon v. Elstad, supra. The issue in Elstad was whether a confession made after the police gave a suspect proper Miranda warnings was inadmissible on the grounds that the police had obtained a prior unwarned admission from the suspect. In considering the issue with

respect to the fruit of the poisonous tree doctrine of Wong Sun, the Court made clear that a violation of Miranda is not a violation of the Fifth Amendment itself. Id., 470 U.S. at 306-07. Rather, the Court noted that Miranda established a nonconstitutional prophylactic rule, the violation of which creates an irrebuttable presumption of coercion that is applicable in only a limited number of circumstances. Id.[1] When an unwarned statement is used in situations when the presumption does not apply, "the primary criterion of admissibility [remains] the 'old' due process voluntary test." Id., 470 U.S. at 307-08 (citations and quotations

---

1. For instance, while the presumption requires suppression of unwarned statements for purposes of the state's case-in-chief, the presumption does not bar introduction of the incriminating statements for impeachment purposes on cross-examination. See Harris v. New York, 401 U.S. 222 (1971).

omitted). Based on the foregoing, and relying heavily on Michigan v. Tucker, supra, the Court held that, when there is no actual infringement of a suspect's constitutional rights, Miranda violations do not require the exclusion of derivative evidence. Id. The Court stated that this principle applies regardless of whether the alleged fruit of the Miranda violation is a witness, article of evidence, or the accused's own voluntary testimony. Id., 470 U.S. at 308.

Courts that have been asked to suppress derivative evidence based on Miranda violations after Elstad have uniformly stated that the exclusionary rule does not apply to such evidence. United States v. Cherry, 759 F.2d 1197 (5th Cir. 1985); United States v. Bengivenga, 845 F.2d 593 (5th Cir. 1988); United States v. Johnson, 816 F.2d 918 (3d Cir. 1987);

Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985); State v. Wethered, No. 54357-7 (Wash.Sup.Ct., May 12, 1988); Bush v. State, 523 So.2d 538 (Ct.Crim.Apps. Ala. 1988); In re: Owen F, 70 Md.App. 672, 523 A.2d 627 (Ct.Spec.App. Md. 1987); State v. Dellorfana, 128 N.H. 628, 517 A.2d 1163 (N.H. 1986). In United States v. Cherry, supra, the Fifth Circuit Court of Appeals was faced with a second appeal of Cherry's conviction. In the first appeal, the court had held that derivative evidence from a Miranda violation must be suppressed. Cherry was again convicted and appealed. On the second appeal, the court stated:

> Our statement in Cherry I that Cherry's consent to the second search was the tainted produce of the violation of his Miranda rights does not survive the Supreme Court's holding in Elstad. While Cherry's confession and other incriminating statements

> remain inadmissible under the prophylactic rule, the validity of Cherry's consent and the admissibility of the derivative evidence depend solely on whether they are the product of an actual violation of a constitutional right.

United States v. Cherry, supra, 759 F.2d at 1210 (emphasis added).

In Martin v. Wainwright, supra, the court was faced with a situation where the police failed to honor the suspect's request to "cut off" questioning. Id., 770 F.2d at 928. The court held that the portion of the statement made after the request was made was in violation of Miranda and was to be suppressed. Id., 770 F.2d at 924. The court held, however, that this portion of the statement was still "voluntary" and not in violation of the Fifth Amendment. Id., 770 F.2d at 925. Therefore, derivative evidence from the Miranda

violation was not subject to the exclusionary rule. Id., 770 F.2d at 928.

On appeal, appellant asserted that the statements given, and the evidence derived from those statements, were in violation of his Fifth Amendment rights. (Arguments I and II.) The state responded by arguing that the statements made by appellant were voluntary, and that if involuntary, they need not be excluded under the test of United States v. Hooton, 662 F.2d 628 (9th Cir. 1981). The state noted, however, that in Michigan v. Tucker, supra, the Court held that a Miranda violation did not warrant the suppression of testimony from a live witness derived from the violation. (Appellee's Answering Brief at 26, n.5.) In its opinion, this Court found the statements were voluntary under the Fifth Amendment, but ordered the derivative evidence from the Miranda violation

suppressed. Slip op. at 39. In ordering the suppression, the Court relied on Wong Sun v. United States, supra; United States v. Ceccolini, 435 U.S. 268 (1978); and various other state and federal cases. However, in each of the cases cited by this Court, there was an actual constitutional (Fourth or Fifth Amendment) violation of the accuseds' rights. Not one of the cited cases stands for the proposition that a Miranda violation invokes the "fruit" doctrine of Wong Sun. Given Tucker, Elstad, and the cases cited above, it is clear that Wong Sun does not apply to Miranda violations. Therefore, if appellant's statements are "voluntary"[2] as this

---

2. There is nothing in the record which would indicate that appellant's will was overborne by the police when they did not cut off the questioning. Martin v. Wainwright, supra. Appellant did not testify or claim that he desired that the questioning cease because he no longer

Court found them to be, this Court should withdraw its opinion, dated September 20, 1988, and reissue an opinion in conformity with Michigan v. Tucker, and Oregon v. Elstad, affirming the conviction.

B. Assuming this Court maintains an "Arizona" rule providing that derivative evidence from a Miranda violation can be suppressed, this Court has misapplied United States v. Ceccolini and United States v. Hooton, and has failed to defer to the discretion of the trial court.

In United States v. Ceccolini, supra, the Court held that, in applying the

---

wanted to talk with the police. The tape clearly indicates appellant did want to talk with the officers, but was physically tired. Although appellant indicated he wanted the questioning to cease, he freely gave answers to non-threatening questions until his medication became intolerable. At that point, appellant refused to answer any further questions. The entire statements were voluntary and not in violation of the Fifth Amendment. Martin v. Wainwright, supra. If this Court has concerns over this issue, it should remand for an evidentiary hearing. United States v. Cherry, supra.

"poisonous tree doctrine" to live-witness testimony, the courts should consider (1) the length of the road between the illegal action and the testimony of the witness at trial, (2) the degree of free will exercised by the witness, and (3) the fact that the exclusion of the witness' testimony "would perpetually disable a witness from testifying about relevant and material facts." United States v. Ceccolini, supra, 435 U.S. at 273-78; United States v. Hooton, supra, 662 F.2d at 632. The Court in Hooton stated that, when police misconduct does not induce the witness' cooperation, the testimony will not be suppressed even though the illegal activity was one step in a series of events that led to the witness testifying. United States v. Hooton, supra; United States v. Leonardi, 623 F.2d 746, 752 (2d Cir.), cert. denied, 447 U.S. 928 (1980). In

determining if police misconduct encroached on the witness' free will, the trial court should consider: (1) the willingness of the witness to testify; (2) the role played by the illegally-obtained evidence in gaining the witness' cooperation; (3) the proximity between the illegal behavior, the witness' decision to cooperate and the actual testimony at trial; and (4) the police motivation in engaging in the improper conduct. United States v. Hooton, supra. As such factors are factual in nature, deference should be given to the trial court's findings. See State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983). The trial court made the following findings regarding the issues concerning the witness' free will:

1. Police Motivation. The police were investigating a 2-year-old homicide and were trying to determine whether

appellant was involved. The trial court found the following:

> I find that the police were interested in trying to determine if in fact this was just a person who was making a statement regarding that incident from which he could have obtained the information either from the newspapers or from having attended Tucson High, or whatever, and in an attempt to determine whether or not they were to exclude this as some type of attention-getting device or a statement made by a person who had given some indication of being mentally ill at one time. So, I don't think at that point the motivation was necessarily directed at trying to obtain the identification of a witness that would help establish the State's case."

(R.T. of Nov. 21, 1985, at 1-2, emphasis added.) This Court rejected the trial court's factual finding and inserted instead an evil motive not found by the trier-of-fact. Such an evil motive is clearly not borne out by the record. While the police did ask questions that led to Champion's name, such questioning was necessary so the police could check

to see if appellant's story was true. While such a scenario is in violation of Miranda, the state takes exception with this Court's factual finding that it was improperly motivated, and asserts that such a finding has no support in the record.

2. Proximity between the illegal behavior and the witness' decision to cooperate and testify. While there was approximately 18 months from the improper police behavior that led to the suppression of appellant's statements and the time of the witness' testimony at trial, the decision by Mr. Champion to cooperate was only weeks after the police misconduct. The trial court found, however, in resolving this factor, that the fact that the witness did not have to testify, and apparently decided to proceed with the testimony even after 18

months had passed, would attenuate the illegal behavior. (Id. at 2-3.)

Again this Court, without the benefit of observing the witnesses, supplants the trial court's finding. This Court states "he [Champion] opened himself up to significant harm if he refused to testify." At the time the police talked with Champion, they promised him that he would not be charged if he talked with them about the La Quinta robbery. Any statements made by Champion regarding La Quinta could never be used to prosecute him for the La Quinta robberies. Champion was represented by counsel and knew that fact. There is nothing in the record that supports this Court's conclusion that Champion could be prosecuted for the La Quinta robberies. Furthermore, Champion stated when first questioned, "If I wouldn't have been involved [in the La Quinta robbery], I

would have called the cops on him to tell you the truth." This Court's findings are speculative and should not replace those of the trial court.[3]

3. The role played by the illegally-obtained evidence in gaining the witness' cooperation. This criteria weighed against the state as the illegally-obtained evidence led the police to the witness and was used to ensure the witness' cooperation.

4. The willingness of the witness to testify. The trial court believed the testimony of the police officers:

> [T]hat there was no indication that [Champion] was to be charged unless he made a statement. Part of the reason I find that is -- find that way is because two weeks later when he had really no motivation whatever but, I guess, trying to clear his conscience, Champion comes in and tells [the detectives] statements about what the defendant allegedly stated to

---

3. See also Finding No. 4, infra.

him regarding the homicide case. That's one factor I'm considering.

Number two, the -- at the time this is occurring, the police officers had really no -- no evidence whatsoever or sufficient to arrest the Witness Champion for the robbery at La Quinta, had no probable cause.

And we have the witness -- the testimony of two witnesses, police officers, who indicated nothing of that nature was mentioned; that what in fact was mentioned was that it in fact he had been -- had not been the trigger man or the one with the gun, that he would not be charged.

Seems to me that that's a more plausible approach than saying when they didn't have probable cause to arrest "We're going to arrest you if you don't cooperate."

In addition, I considered the fact that apparently that was the first time such a statement had been raised by Mr. Champion, to-wit: That he had been threatened, although the case has been pending and apparently he has made statements to counsel and other folks prior to this time.

And it seems to me that -- also, the pressures that he must feel at this point to be testifying against a person who was a friend,

> as he indicated, for approximately five years before this whole business occurred.

(R.T. of Nov. 21, 1985.) This Court again disregards the above findings, and speculates that Champion had no other options. Nowhere does such a hypothesis find credence in the record. Again, this Court merely second-guesses the trial court.

The trial court then balanced the findings and concluded that under Hooton and Ceccolini, the costs of exclusion outweighed its benefit and denied the motion. This Court dispensed with balancing the costs and merely stated that such evidence should be excluded based on this Court's new factual findings. Clearly, justice is not served by the short shrift this Court gives such an analysis. As stated by the United States Supreme Court, "[A] living witness is not to be mechanically equated with

the proffer of inanimate evidentiary objects illegally seized . . . . [T]he living witness in an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." United States v. Ceccolini, 435 U.S. 268, 277 (1978), quoting from Smith v. United States, 117 U.S.App.D.C. 1, 3-4, 324 F.2d 879, 881-82 (1963). This Court's mechanical application of the Hooton test fails to take into consideration the very concept that makes the suppressing of live witnesses unique under the exclusionary rule. Live witnesses should not be suppressed unless state's violation of the accused's constitutional rights coerce the witness into testifying. United States v. Hooton, supra. No such coercion can be found in this record.

CONCLUSION

Based on the foregoing, the state requests that this Court reconsider its opinion dated September 20, 1988, and affirm the conviction.

DATED this 5th day of October, 1988.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

/S/ Crane McClennen for

PAUL J. McMURDIE
Assistant Attorney General

Attorneys for APPELLEE

COPIES of the foregoing mailed
this 5th day of October, 1988, to:

GEORGE HASKEL CURTIS
Curtis & Cunningham
5610 East 22nd Street
Tucson, Arizona 85711

/S/ Crane McClennen
CRANE McCLENNEN

7593d clp
CRM86-0274

APPENDIX C

ORDER OF THE ARIZONA SUPREME COURT

SUPREME COURT

STATE OF ARIZONA

201 WEST WING STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2866

TELEPHONE (602) 255-4536

November 10, 1988

RE: STATE OF ARIZONA vs. ALEXSANDRO BRAVO

Supreme Court No. CR-86-0015-AP

Pima County No. CR-13421/13184

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 8, 1988, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration = DENIED.

Copy of Order Affirming in Part, Reversing in Part and Remanding for New Trial (Mandate) enclosed.

DAVID R. COLE, Clerk

TO:

Hon. Robert K. Corbin, Attorney General, 1275 W. Washington, Phoenix, AZ 85007
ATTN: William J. Schafer, Esq. and Paul J. McMurdie, Esq.

George H. Curtis, Esq., Curtis & Cunningham, 5610 E. 22nd Street, Tucson, AZ 85711

Alexsandro Bravo, Box B-52579, Arizona State Prison, Florence, AZ 85232

Stephen D. Neeley, Esq., Pima County Attorney, 110 West Congress, Tucson, AZ 85701

APPENDIX D

APPELLANT'S OPENING BRIEF

[Dated August 8, 1986]

IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. CR-86-0015
	)	
vs.	)	(Pima County
	)	Superior Court
ALEXSANDRO VINCENTE	)	#CR-13184 and
BRAVO,	)	CR-13421)
	)	
Defendant.	)	
	)	

APPELLANT'S OPENING BRIEF

CURTIS & CUNNINGHAM
Attorneys at Law

By /S/
GEORGE HASKEL CURTIS
Attorney for Appellant

I

THE CONFESSION OBTAINED AND USED BY THE STATE WAS INVOLUNTARILY GIVEN, THEREBY OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

As previously related, Det. FRANK MARTINEZ was called down to interview appellant on April 17, 1984, while appellant was incarcerated in the Cochise County Jail. When appellant was advised of his rights, he stated that he did not want to say anything to the officer (tr. 11/26/85, p. 9). Shortly thereafter, he agreed to talk, waived his rights, and stated to the detective that he shot an elderly lady, possibly oriental, in Tucson, perhaps in 1982. (Tr. 11/26/85, p. 11/12).

When that interview was concluded, Det. PERRY LOWE, and Det. GONZALES of the Tucson Police Department traveled to Bisbee and also took a statement of appellant's, this time taped, still on April 17, 1984. No notice was given until the following day to appellant's attorney that any such statement was being taken.

Appellant strongly urges this court to hold that such confession, taken of a severely mentally disturbed person, was involuntary and obtained in violation of the Fifth Amendment to the United States Constitution. By permitting use of such statements, the law has taken the blackjack out of the hands of the police, only to be replaced by the hypodermic needle.

The state was providing and injecting appellant with a psychotropic medicine

designed to cause appellant to become more manageable, and to lessen one's suspicions.

> "Q. It is used to lower the suspicions that are considered to be undue suspicions in a paranoid schizophrenic, I take it?
> A. That's right.
> Q. That's one of the sided [sic] effects when someone's suffered from psychosis, particularly paranoid schizophrenia?
> A. That's right."

That testimony was given by the State's own psychiatrist, DR. EDWARD S. GELARDIN. (Tr. 10/28/85, p. 62.)

The question of the State's ability to first treat, and then benefit from, the designed effect of the drugs is of significant proportions with today's ever increasing medical technology. At what point is the line drawn in use of statements given while under the influence of these psychotropic medications.

There is no question that confessions re prima facie involuntary and the State ears the burden of persuasion that one s the product of a free and voluntary ill. State v. Arnett, 119 Ariz. 35, 579 .2d 542/1978).

Clearly, appellant continued to suffer psychotic delusional state of mind. This was confirmed by the Cochise County Jail's nurse, NANCY KIRKMAN, (tr. 10/28/85, p.24, lines 21-25). The day after appellant gave his statement, MS. COUSEY found him to still be disoriented, confused, and preoccupied. (Tr. 11/27/85, p.54, lines 17/18). This mental state was a direct result of a "blantantly" [sic] psychotic state of mind, probably paranoid schizophrenia. (Tr. 11/27/85, p.12, lines 20-25).

As DR. DAVID GURLAND testified, appellant was under the influence of

sedating medication, still in a very disturbed state, at the point of the questioning. A false belief was a definite possible symptom of such state of mind. (Tr. 11/27/85, p.18).

Appellant requests this Court, as it did in State v. Claborne, 142 Ariz. 335, 690 P.2d 54, (1984), to review the tape and transcript of the statement. That statement is the product of a mentally ill person, even then experiencing severe physical reaction from the medication, one who had no ability to resist the questioning.

On four occasions, once to DET. MARTINEZ, and three times on the tape, appellant stated he did not want to answer questions. His inability to maintain that posture is a product of his psychotic state and the medication's effects. His continued participation on

the tape evidences an inability to exercise his will, which was anything but "free" at the time. As reflected on the tape, he never answered the question as to whether he understood and desired to waive his right to remain silent.

JUSTICE FRANKFURTER, in his plurality opinion in Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed. 1037 (1961), wrote an impressive paragraph quite appropriate to this case. He wrote:

> "At the other pole is a cluster of convictions each expressive, in a different manifestation, of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it. Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by officials charged with the investigation of crime. Cardinal among them, also, is the conviction, basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law, that, in Hawkins' words,

a prisoner is not "to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown (8th ed. 1824) 595. This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber, was well known to those who established the American governments. Its essence is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, , [sic] not by the simple, cruel expedient of forcing it from his own lips." (Emphasis added.)

The totality of the circumstances

evidence that appellant's will was

overborne by the following factors:

a. Psychotic delusional state of mind.
b. Voice hallucinations that told him what to do.
c. Heavily medicated by a drug designed to reduce suspicion and induce a state of trust.
d. Ambivalence in decision.
e. Continued disorientation for the period of April 11, 1984 through April 18, 1984.
f. His almost "catatonic" state on April 16th.

g. Failure of notification of his attorney.
h. Initial introduction as "friends", relating to the police detectives.
i. His failure to specifically waive his right.
j. His repeated request not to answer additional questions.

State v. Edwards, 111 Ariz. 357, 529 P.2d 1174, (1975), summed up the law in suppressing a questionable confession as follows:

> "If the confession is the result of a free choice of the individual, then it may be used as evidence against him, but if his will has been overborne and his capacity for decision diminished, then the use of his confession is violative of the principles of due process. Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L.Ed. 2d 760 (1960)."

Appellant requests this Court to hold that confessions made while the individual is acting under the influence of drugs intended to increase trust and lessen suspicions, are by definition involuntary, in that the individual is no

longer exercising his free will. Specifically, in the case at hand, request is made to suppress all of appellant's statements, as they all occurred as a direct result of the intended effects of the medication.

II

THE USE OF THE TESTIMONY OF DANNY CHAMPION WAS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial court ruled that from the point on page 5 of the tape recorded statement to the end, appellant's constitutional right to end questioning at any point had been violated, and the remaining portion of that confession could not be used in evidence.

Disregarding the law of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1612, 16 L.Ed.2d 694 (1966) and the twenty years of cases after that, the officer in question, in as open and insulting a manner as possible to the laws of the United States, completely ignored appellant's request to end the questioning. The officer took it upon himself to violate the law and to attempt to profit therefrom. Unfortunately, he succeeded at the trial level.

Contained in that illegally obtained portion of the confession is the first, and only, reference the police received concerning the possible second assailant in the Tinker case, that being the name of DANNY CHAMPION.

After a defense request to suppress the testimony of DANNY CHAMPION under the doctrine of the "fruit of the poisonous

tree", the court permitted his testimony. That testimony, truthful or not, was the only evidence which actually linked appellant to the TINKER case, as there was no actual identification of appellant, nor was his confession concerning that crime able to be used, as previously discussed.

Beginning with Wong Sun v. United States, 371 U.S. 471, 80 S.Ct. 407, 9 L.Ed.2d 441 (1963), evidence obtained from unlawfully gathered evidence may not be used at trial, unless the challenged evidence has become "so attenuated as to dissipate the taint", Nardome v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1934).

The exclusion of witnesses has been upheld to further the objections of Wong Sun, supra. United States v. Socios, 590 F.2d 956 (1978).

The United States Supreme Court, in United States v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054, (1978), set forth constitutional guidlines [sic] for the exclusion of witness testimony under the "poisonous tree" doctrine.

These guidelines were also succinctly set forth in United States v. Horton, 662 F.2d 628 (9th line, 1981). They were as follows, (with a discussion of the evidence as it relates to DANNY CHAMPION):

1. Willingness of witness to testify:

The free will of the witness coming forward is significant. His testimony is more readily lawfully used if he "steps forward" and offers himself as a witness, than if he remains in hiding and must be threatened to testify.

MR. CHAMPION, for three years, remained in hiding. He talked to the police only after they came after him. As to the

substance of his testimony, it is significant to note the following: (Tr. 11/20/85, p. 98, lines 19-25, p. 99, lines 1-2.)

"Q. Okay. At that time did you tell the officers about the incident at La Quinta back in 1981?
A. They tole [sic] me first.
Q. They told you. What did they tell you?
A. They told me what was going on before -- what had been -- they gave me that -- Alex Bravo's statement. They told me from what -- not -- not on tape, but they told me what he had told them. And I just agreed with them."

Furthermore, he agreed to talk only because: (Tr. 11/20/85, p. 99, lines 5-12.)

"A. Well, I don't recall. Like for one, I never told neither you two, but I was in a sense forced to come down here because Perry Lowe's partner, when I got picked up, when I went down to the Police Department, he did state that if I walked out of there and talked to the attorney, I'd get my ass busted. Excuse my

language, but that's what he said."

Det. LOWE admitted CHAMPION was "quite hesitant" to say anything about the La Quinta robbery. (Tr. 11/20/85, p. 144.)

This is hardly the public spirited citizen that the police would have come up with even without the illegally obtained confession.

2. The significance of the illegally obtained evidence in obtaining the knowledge and testimony of the witness; and

3. The proximity between the criminal events, the alleged police conduct, the initial witness contact and the trial testimony.

In both of these points, the facts clearly disclose that but for the continuation of the questioning, the police would never have even questioned

CHAMPION, let alone have been able to provide a story for him and to apply pressure to "talk."

Although the crime occurred December of 1981, the investigation still had no leads and certainly none which involved CHAMPION.

Furthermore, immediately after they received the information about CHAMPION, they brought him in and questioned him.

The information from CHAMPION directly resulted from the police misconduct, and occurred immediately following the misconduct. There is no lapse of time to show that the police did not desire to profit from their actions. To permit CHAMPION'S testimony is a signal that the court condones this behaviour [sic].

4. The police motivation in the misconduct.

On page 5 of the confession, continuing to page 6, the following statements were made by the appellant:

"A. Well, I don't wanna answer anymore questions.
CG. What's that?
A. I already said what I could.
PL. Do you know RICKY GERMANY?
A. Uhmm. I'm not his friend though.
PL. Why aren't you his friend?
A. Because . . . he doesn't like me.
PL. When did he stop liking you?
A. When we started fighting.
PL. When was that?
A. I don't remember.
PL. That was after the shooting or before the shooting?
A. After the shooting. No more questions.
PL. OK, just relax.
A. I can't with that stuff.
PL. Can you lean back?
A. No.
PL. Stretchit [sic] out.

The questioning continued.

Of course, the prosecution was also familiar with the guidelines set forth in Horten, supra. As a result, testimony was presented on this issue by Det. LOWE,

testimony which insults one's intelligence. He claimed that the only reason that he failed to comply with appellant's repeated requests to cease being questioned was because he needed additional facts to confirm appellant's involvement in the homocide [sic]. (Tr. 11/20/85, p. 150.)

First of all, this hardly shows innocent mistake, as the purpose of a confession is to prove involvement by the person being questioned. Secondly, facts had already been brought out as to where the victim was shot, the location of the store, the number of shots, the time of day, etc. Third, after the request to stop questioning was made, the entirely new area of the TINKER (La Quinta) robbery was discussed. This was hardly designed to elicit information confirming the WONG case. Fourth, LOWE suggests that actually he just didn't believe

appellant meant all questions, just about the "particular thing" LOWE had asked him before. (Tr. 11/20/85, p. 151.) Further, that appellant didn't seem to be "strenuously" objecting (Tr. 11/20/85, p.150). (Appellant was unaware that to curtail questioning, a police officer had to be convinced that a defendant was "strenuously" objecting.)

Finally, however, the true motive of LOWE was omitted as to why the questioning continued. He simply felt, due to the court system, he might be able to get away with it. He states:

> "A. I have been aware of the Miranda decision and the different rulings from different courts and which is admissible and which is not admissible and when it can be used and when it can't be used.
> And I believe -- if I believe that I'm trying to protect everyone's rights and find out what is the truth, I let the judge make that decision."

In other words, why abide by the law of the land when a judge might let you get away with it. The failure to stop questioning after the repeated requests by appellant is as open and flagrant a violation as has been seen in quite some time. To suggest to the trial court that this officer "innocently" continued questions is an insult.

Appellant suggests in each section of the guidelines the law clearly requires that CHAMPION'S testimony be suppressed. To rule otherwise effectively terminates the exclusionary rule. The purpose of that rule is not to exclude evidence, but to see that police officers respect an individual's constitutional rights. Such was not the case herein. . . .

APPENDIX E

APPELLEE'S ANSWERING BRIEF

[Filed October 27, 1986]

IN THE SUPREME COURT

OF THE STATE OF ARIZONA

STATE OF ARIZONA,	)	
	)	
Appellee,	)	NO. CR-86-0015
	)	
-vs-	)	PIMA COUNTY
	)	SUPERIOR COURT
ALEXSANDRO VINCENTE	)	
BRAVO,	)	CAUSE NOS.
	)	CR-13184
	)	AND CR-13421
Appellant.	)	
	)	

APPELLEE'S ANSWERING BRIEF

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

PAUL J. McMURDIE
Assistant Attorney General
Department of Law
1275 W. Washington,
1st Floor
Phoenix, Arizona 85007
Telephone: (602)255-4686

Attorneys for APPELLEE

. . . .

ARGUMENTS

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DETERMINING THAT THE STATEMENTS MADE BY APPELLANT WERE VOLUNTARY UNDER THE DUE PROCESS CLAUSE AND, THEREFORE, ADMISSIBLE.

Appellant contends that the confessions obtained and used by the state were involuntarily given in violation of the Fifth Amendment due to the mental disability of appellant and the medication prescribed by jail physicians. (Appellant's Opening Brief, at 8-12.) Appellee disagrees

Before a confession can be used in the trial court, the state must show by a preponderance of the evidence that the confession was freely and voluntarily made. State v. Graham, 135 Ariz. 209, 211, 660 P.2d 460, 462 (1983). At trial, the trial court must look to the totality of the circumstances in evaluating the

BEST AVAILABLE COPY

voluntariness of a confession. Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 32 L.Ed.2d 433 (1969); State v. Graham, supra. The totality of the circumstances includes both the characteristics of the accused and the details of the interrogation. State v. Hensley, 137 Ariz. 80, 88, 669 P.2d 58, 66 (1983). In assessing these factors, the trial court must determine whether the confession was the product of an essentially free and unconstrained choice by its maker or whether his will has been overborne and his capacity for self-determination critically impaired. Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973); State v. Hensley, supra. Once the trial court weighs and evaluates these circumstances, however, its ruling will not be overturned on appeal unless it is clear

and manifest error. State v. Graham, supra.

An accused's confession is coerced where the will was overborne or the confession not the product of a rational intellect and free will. Townsend v. Sain, 372 U.S. 293, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963). The standard of overbearance is applicable whether the coercion is in the form of physical intimidation, psychological pressure, or drug-induced. Townsend v. Sain, supra. A mental illness alone, however, will not preclude the admission of an otherwise voluntary confession unless the illness rendered the declarant unable to understand the meaning of the statements made. State v. Porter, 122 Ariz. 453, 456, 595 P.2d 998, 1001 (1979). Hence, the test for voluntariness, in cases where a defendant is under the influence

of narcotics or has mental disabilities, is whether these problems render him unable to understand the meaning of his statements. State v. Clabourne, 142 Ariz. 335, 342, 690 P.2d 54, 61 (1984); Wolfrath v. La Vallee, 576 F.2d 965 (2d Cir. 1978), cert. denied, 439 U.S. 933 (defendant's confession while under the influence of morphine, demerol, and sodium luminal was admissible given testimony of his coherency during questioning); People v. Kincaid, 87 Ill.2d 107, 57 Ill.Dec. 610, 429 N.E.2d 508 (1981) (fact that accused was under the influence of haldol when he confessed did not automatically render confession inadmissible, but was a factor to consider in determining if defendant's will was overborne); Blanchard v. State, 247 Ga. 415, 276 S.E.2d 593 (1981) (defendant's confession while under influence of phencyclidine administered

while in mental hospital was admissible as he was capable of understanding gravity of his action).

In the instant case, the following evidence was presented to the trial court regarding appellant's confessions:

Nancy Kirkman (called by the state, R.T. of Oct. 28, 1985, a.m., at 4-49; R.T. of Oct. 28, 1985, p.m., at 4-31). Ms. Kirkman, a counselor with the Cochise County Sheriff's Department, stated that she was present on April 4, 1984, when appellant was booked in the county jail. (Id., a.m. session, at 6.) Ms. Kirkman stated appellant was very disturbed, unable to communicate, and was literally bouncing off the walls. (Id. at 7.) Initially, Kirkman believed appellant was under the influence of PCP. (Id.) On April 12, 1984, the county's psychiatric counseling service put appellant on a psychotropic medication - haldol. (Id.

at 9.) An anticholenergic drug, symmetrel, was administered to help prevent side effects from the haldol. (Id.) Haldol is a psychotropic medication which clears abnormal confusion and allows for communication. (Id. at 12.) On April 16, 1984, appellant's mental condition had improved, and he was more reasonable and communication was possible. (Id. at 11-12.) On April 17, 1985, Detention Officer Jack Willick brought appellant into Kirkman's office and indicated that appellant had stated he wanted to confess to a crime. (Id. at 14.) Ms. Kirkman took appellant into her office, and without being questioned, appellant told Kirkman that he had lived with it long enough and that he needed to confess to a crime -- that he had murdered a lady in Tucson. (Id. at 14, 17.) Ms. Kirkman stated to appellant that whatever he said

to her concerning a crime or jail security would not be held in confidence and that she did not want to hear his confession; but she would call a detective if he wanted. (Id. at 15-16.) Appellant indicated he wanted to talk to the detective. (Id. at 16.) Ms. Kirkman summoned a detective to her office. (Id.) Ms. Kirkman then explained to appellant who was coming and that whatever appellant said to the detective could be used against him. (Id. at 18.) Appellant was, however, "very determined to make this confession." (Id.) Detective Martinez arrived and he and Kirkman explained to appellant in great detail each of the rights under Miranda. (Id. at 19.) Appellant elected not to speak and Detective Martinez left the room. (Id. at 20.) Martinez entered the elevator to leave when appellant stated "please make him come back, I want to

talk to him." (Id. at 22.) From the time Martinez left the room until appellant requested his return, no words were spoken between appellant and Kirkman. (Id. at 22.) Martinez and Kirkman again explained to appellant his Miranda rights. (Id. at 22-23.) Appellant indicated he wanted to talk and Kirkman left the room. (Id. at 25.) Ms. Kirkman found appellant's conversations and actions during the incident on the 17th to be responsive and appropriate under the circumstances, and in her opinion appellant understood what was happening. (Id. at 23-25.) During the time appellant was with Ms. Kirkman, there were no observable physical side effects of haldol. (Id., p.m. session, at 21.)

Jack Willick (called by the state, R.T. of Oct. 21, 1985, p.m., at 40-89). Officer Willick, a detention officer for

Cochise County, stated that, prior to April 17, 1984, he was unable to carry on a normal conversation with appellant. (Id. at 43.) On April 17, 1984, appellant changed and Officer Willick was able to engage in a normal conversation with him. (Id. at 44-45.) At 12:15 p.m., appellant asked Willick if he could make a telephone call. (Id.) Willick escorted appellant to the recreation room and appellant placed a phone call without any assistance from the jailer. (Id. at 46.) Appellant engaged in a normal phone call for approximately 10 minutes, whereupon he was escorted back to his cell. (Id. at 46.) On the way back to his cell, appellant and Willick engaged in light conversation. (Id. at 48.) Appellant hesitated upon entering his cell and acted as if something was bothering him. (Id.) Willick asked appellant if there

was anything he could do. (Id.) Appellant indicated no, and Willick stated if there was, to give him a call. (Id.) At 2:15 p.m., appellant summoned Willick to his cell. (Id. at 49.) Appellant indicated to Willick that he wanted to tell somebody about a very bad thing he had done, which was bothering his conscience, and stated, "I killed an old Chinese woman in an armed robbery in Tucson." (Id. at 50.) Officer Willick asked appellant if he wanted to talk with Ms. Kirkman the counselor. (Id.) Appellant stated that he did wish to speak with Ms. Kirkman. (Id.) Willick escorted appellant to Kirkman's office. (Id.) Mr. Willick indicated that during the time period he was with appellant on April 17, appellant was alert and his conversation was easy to understand. (Id. at 52.)

Frank Martinez (called by the state, R.T. of Oct. 21, 1985, p.m., at 90-124). Frank Martinez, Cochise County Detective, stated that he had never met appellant until on April 17, 1984, when he was summoned to Nancy Kirkman's office to take a statement regarding a crime. (Id. at 91-92.) Upon entering the room, Detective Martinez read appellant his Miranda rights. (Id. at 95.) After Martinez read each right, Ms. Kirkman explained them to appellant, and appellant indicated he understood. (Id.) After all of the respective rights were read, appellant indicated he did not wish to speak with the detective. (Id. at 100.) Detective Martinez honored apellant's request and left the room. (Id. at 100-01.) As Martinez entered the elevator, Ms. Kirkman summoned Martinez back to her office indicating appellant

had changed his mind. (Id.) Detective Martinez and Kirkman readvised appellant of his rights and appellant stated that he just wanted to get it off his chest, waived his rights, and confessed. (Id.) Detective Martinez stated that in the 30-45 minutes that he was with appellant, appellant was responsive to all conversations and seemed to understand what he was doing. (Id. at 96, 102-05, 108.)

Perry Lowe (called by state, R.T. of Oct. 28, 1985, p.m., at 78-112). Perry Lowe, detective for Pima County, stated that on April 17, 1984, Frank Martinez telephoned him in Tucson and indicated that he had an inmate in Bisbee that had confessed to a homicide in Tucson. (Id. at 79.) Detective Lowe and his partner, Ed Gonzales, traveled to Bisbee to talk with the inmate. (Id.) The detectives talked with appellant and the entire

conversation was tape recorded. (Id. at 81.) See transcript of the conversation in the appendix, infra. Detective Lowe stated that, in observing appellant, he appeared to be responsive and understood what he was saying. (Id. at 82.) Detective Lowe further stated, however, that during the interview, appellant appeared to be suffering physical discomfort from the medication given him. (Id. at 100.)

Edward Gelardin (called by the state, R.T. of Oct. 28, 1985, p.m. session, at 35-77). Dr. Gelardin, a physician specializing in psychiatry, evaluated appellant twice as a court-appointed expert to determine appellant's competency to stand trial. (Id. at 37.) The evaluations occurred on June 22, 1984, for Cochise County, and on October 18, 1984, for Pima County. (Id.) At the conclusion of both

evaluations, Dr. Gelardin found appellant competent to stand trial. (Id. at 38.) Dr. Gelardin, after evaluating the statements made by witnesses, appellant's statements to him in his evaluation regarding his confession, and after listening to the taped confession, concluded that on April 17, 1984, appellant was capable of understanding his statements and did, in fact, understand them. (Id. at 39-40.) The doctor found that the answers in the taped confession indicated that appellant was well oriented, that he tried to protect himself at times and protect his friends at other times. (Id. at 41.) That the questions asked appellant tested his memory and appellant's answers compared well with the actual facts indicating his memory and perception were not distorted. (Id.) Dr. Gelardin stated:

> [I]t seems to me that he well understands what he's being asked, and not only understands his responses, but seems to have at least some feeling for which questions make him look bad and which answers make him look bad -- which answers make him look good. And also he has an ability to be consistent with his story, because there was one point where the cops . . . were trying to put words in his mouth, and he wouldn't let them. . . . So that ability to stick to one's story, you know, not only implies his ability to remember, but to remember what's important and keep track of the whole proceeding in a way.

(Id. at 41-42.) The doctor also noted that appellant's consistent feelings of guilt or uneasy conscience would imply that he was aware that what he did was wrong and that there would be tough consequences from his confessing. (Id. at 43.) Upon review of the entire record, Dr. Gelardin could not find any evidence that indicated that appellant did not comprehend the statements made on April 17, 1984. (Id. at 52.) Dr. Gelardin stated the drug haldol will

remove paranoid undue suspiciousness and allow a "calm, normal function of mind without lowering [the] level of consciousness." (Id. at 61-62.)

Susan Cousy (called by appellant, R.T. of Oct. 15, 1985, at 6-52). Ms. Cousy, Clinical Director of the Cochise Community Counsel Services, stated that on April 11, 1984, she ordered that appellant be placed on 5 milligrams of haldol and 100 milligrams of symmetrel. (Id. at 27.) Ms. Cousy did not see appellant again until April 18, 1984, where she found him to be "somewhat disoriented and confused." (Id. at 28.)

John Calahar (called by appellant, R.T. of Oct. 29, 1985, at 5-24). Mr. Calahar, appellant's trial attorney on the Cochise County charges, stated that on April 16, 1984, he interviewed appellant in the Cochise County Jail. (Id. at 6.) Mr. Calahar perceived appellant, during

the interview, to have difficulty understanding the questions asked of him and Calahar would have to re-ask the questions. (Id. at 8.) Based on this interview, Mr. Calahar believed that on April 16, 1984, appellant was unable to understand much of anything. (Id. at 15.) On cross-examination, however, Mr. Calahar admitted that all of appellant's answers to his questions were responsive and accurate. (Id. at 20.)

Richard Hinton (called by appellant, R.T. of Oct. 21, 1985, a.m. session, at 4-36). Mr. Hinton, a clinical psychologist, stated that he had met with appellant on September 25, 1984, for a pre-Rule 11 screening, and on March 14, 1985, for a determination of competency to be sentenced. (Id. at 5-6.) Upon review of appellant's abnormal behavior upon initial intake into the county jail,

and his subsequent action on April 17, 1984, Dr. Hinton concluded:

> [I]f [appellant] was demonstrating all of the symptoms which we have described, I would -- I would conclude that he was psychotic and therefore unable to competent -- not competent in any legal way at that time, at the time that all of those behaviors were being demonstrated.
>
> However, the description of him is that he does appear to have improvements and exacerbation of his behavior. And during times of improvement I personally have seen him to be a person who was competent and free of any significant indication of mental illness.
>
> So, using some backward reasoning, I may conclude that he was at [the time of his confession] not showing any signs of -- of psychosis as described by Ms. Kirkman. And therefore, he was competent.

(Id. at 23-24.)

David Rubin (called by appellant, R.T. of Oct. 21, 1985, p.m. session, at 2-38). Dr. Rubin, a psychiatrist, stated that on May 10, 1984, he interviewed appellant to determine his competency to

stand trial. (Id. at 4.) Dr. Rubin, based on his perception of appellant from that interview, felt appellant's judgment on April 17, 1984, would have been impaired, but to what extent he could not say. (Id. at 10.) After listening to the taped confession, however, Dr. Rubin conceded that appellant's statements were relevant, logical, and coherent. (Id. at 34-35.)

David Gurland (called by appellant, R.T. of Oct. 15, 1985, at 52-88). Dr. Gurland, a psychiatrist, stated that he performed a court-ordered evaluation of appellant on October 11, 1984. (Id. at 54.) Based on the facts presented to him, Dr. Gurland believed that, on April 17, 1984, appellant had the mental capacity to understand only the right not to answer any more questions. (Id. at 62.) Dr. Gurland noted, however, that appellant's answers were responsive to

the questions asked. (Id. at 77.) Dr. Gurland informed the court that haldol, if effective, would organize one's ability to grasp what was going on around him. (Id. at 80.)

As noted earlier, the trial court, after considering all of the evidence, held that the haldol given appellant placed him in a "normal" condition, that appellant understood the meaning of his statements, and the side effects of the medication had no bearing on the confessions. (R.T. of Nov. 4, 1985, at 7-8, 36-37.) The trial court's findings are supported by the record on appeal. Appellant disputes the trial court's findings by arguing (1) it is a violation of the due process clause for the state to assist a mentally ill person by placing him on psychotropic medication that removes his abnormal paranoia, rendering him in a normal condition, and

thereafter benefitting from that treatment when the person confesses; and (2) that given the totality of the circumstances, the trial court was wrong in finding that appellant's will was not overborne.

In regards to appellant's first contention, in Blackburn v. Alabama, 361 U.S. 199, 207, 80 S.Ct. 274, 280, 4 L.Ed.2d 242 (1960), the United States Supreme Court held the use of a confession of an individual made while insane violates the due process clause because (1) the confession would be inherently unreliable; (2) the lack of rational choice of the accused; and (3) that our system of criminal justice should not operate to take advantage of a person in this fashion. In the instant case, the trial court held the confessions were made while appellant was in a "normal" state. The question then

arises, "Does the due process clause prohibit the state from using an otherwise voluntary confession if they administered to a defendant a psychotropic medication to render him competent?"

In applying the Court's concerns as stated in Blackburn to the case at bar, due process does not mandate the suppression of appellant's confessions. Regarding reliability, while statements made by an "insane" defendant are clearly questionable, statements made by someone who has regained normalcy are reliable. Furthermore, the confession given by appellant proved to be very reliable, as he provided facts that only the perpetrator would have known.

Concerning the lack of rational choice, by definition a "normal" person is in the position to either invoke his rights or talk with the authorities. In the

instant case, the first two admissions of guilt, to Detention Officer Willick and counselor Kirkman, were at the initiation of appellant and not in response to any form of interrogation, indicating exercise of will by appellant. Also, appellant's statements regarding his need to confess to alleviate the guilt he felt, a common phenomenon, demonstrates rational choice.

Finally, concerning the propriety of allowing the state to operate in this fashion, there is no evidence that indicates the state administered the haldol as a means to render appellant more amenable to confess to the murder of Mrs. Wong. On intake into the Cochise County Jail, the state had no knowledge that appellant was involved in those crimes and, without question, appellant was in dire need of the assistance rendered by the state. The state acted

appropriately under the circumstances, and appellant's otherwise voluntary confession should not be suppressed because the state placed appellant in the position to make a voluntary confession.

Appellant's second contention is that, given certain factors, the trial court abused its discretion in holding the confessions were voluntary. Considering the term "abuse of discretion," this Court has explained:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for

> that of the trial judge; we will not second-guess.

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Determination of the very existence and effect of all of appellant's listed "factors"[4] would be based on the assessment of the conflicting factual considerations that this Court described as "better determined or resolved by the trial judge." The trial court did not abuse his discretion by resolving the factual considerations against appellant.

---

4. Only factor "g" (the state did not notify defense counsel of appellant's request to confess) was not in dispute at the evidentiary hearing. This Court has held that there is no duty on the state to notify counsel if the accused makes a voluntary waiver. State v. Clabourne, 142 Ariz. 335, 341-42, 690 P.2d 54, 60-61 (1984). Therefore, this "factor" is irrelevant.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION DID NOT REQUIRE THE SUPPRESSION OF THE TESTIMONY OF DANNY CHAMPION.

Appellant contends that the trial court erred after suppressing a portion of appellant's confession to Detectives Lowe and Gonzalez by not suppressing the "fruit" of the suppressed confession, the testimony of Danny Champion. (Appellant's Opening Brief, at 13-18.) Appellee disagrees.

It is an established principal of law that third-party, live-witness testimony can be a "fruit" under the "poisonous tree doctrine," under both the Fourth and Fifth Amendments. See United States v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); United States v. Schaefer, 691 F.2d 639 (3d Cir. 1982); United States v. Hooton, 662 F.2d 628

(9th Cir.), cert. denied, 455 U.S. 1004 (1981); United States v. Scios, 590 F.2d 956 (D.C. Cir. 1978).[5] The original cases that marked the origin and development of the tainted "fruit" of the "poisonous tree doctrine" involved violations of the Fourth Amendment guarantee against unreasonable searches and seizures. United States v. Massey, 437 F.Supp. 843, 855 (M.D.Fla. 1977). The doctrine was also applied, however, to the "fruits" of a statement obtained

---

5. In Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Court refused to apply the "fruit" doctrine to a third-party, live witness who was located through the use of confession in violation of Miranda, but otherwise voluntary. The Court noted that the prophylactic Miranda rights were only instituted to protect the right against compulsory self-incrimination, but were not themselves protected rights. Id., 417 U.S. at 446.

in violation of an accused's Fifth Amendment right. United States ex rel. Hudson v. Cannon, 529 F.2d 890 (7th Cir. 1976). The United States Supreme Court has relied, to a considerable extent, on Fourth Amendment cases in determining what evidence is excludable as the fruit of a coerced confession. Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

In United States v. Ceccolini, supra, a police officer's illegal search of an envelope in the defendant's flower shop led to the discovery of the key government witness in the defendant's perjury trial. The Court held that the degree of attenuation between the illegality and the testimony was sufficient to dissipate the connection. The Court arrived at its conclusion by balancing the benefits of the exclusionary rule against its costs. The

Court held that, in applying "poisonous tree doctrine" to live-witness testimony, the following material factors should be considered: (1) the length of the road between the illegal action and the testimony of the witness at trial; (2) the degree of free will exercised by the witness; and (3) the fact that the exclusion of the witness' testimony "would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby." United States v. Ceccolini, supra, 435 U.S. at 273-78; United States v. Hooton, supra, 662 F.2d at 632. In Hooton, the Court stated that, where police misconduct does not induce the witness' cooperation, the testimony will not be suppressed even though the illegal activity was one step

in a series of events that led to the witness testifying. United States v. Hooton, supra; United States v. Leonardi, 623 F.2d 746, 752 (2d Cir.), cert. denied, 447 U.S. 928 (1980). In assessing the effect of the illegal activity on the witness' free will, the trial court should consider: (1) the willingness of the witness to testify; (2) the role played by the illegally-obtained evidence in gaining the witness' cooperation; (3) the proximity between the illegal behavior, the witness' decision to cooperate and the actual testimony at trial; and (4) the police motivation in engaging in the improper conduct. United States v. Hooton, supra.

In the instant case, on November 4, 1985, the trial court suppressed appellant's statements from the point in his confession where he indicated that he

did not want to answer any more questions. (See Transcript of Confession, appendix, infra.) Whereupon, appellant moved for the suppression of evidence derived from the suppressed confession, namely the witness Danny Champion. (Record on Appeal, Document No. 126.) On November 20, 1985, the trial court conducted an evidentiary hearing regarding appellant's motion. (R.T. of Nov. 20, 1985, at 93-161, 183-212.) On November 21, 1985, the trial court made the following findings regarding the issues concerning the witness' free will:

1. Police Motivation. The police were investigating a 2-year-old homicide and were trying to determine whether appellant "was just a person who was making a statement regarding that incident from which he could have obtained the information either from the

newspapers or from having attended Tucson High, or whatever, and in an attempt to determine whether or not they were to exclude this as some type of attention-getting device or a statement made by a person who had given some indication of being mentally ill at one time. So, I don't think at that point the motivation was necessarily directed at trying to obtain the identification of a witness that would help establish the State's case." (R.T. of Nov. 21, 1985, at 1-2.)

2. Proximity between the illegal behavior and the witness' decision to cooperate and testify. While there was approximately 18 months from the improper police behavior that led to the suppression of appellant's statements and the time of the witness' testimony at trial, the decision by Mr. Champion to cooperate was only weeks after the police

misconduct. The trial court found, however, in resolving this factor, that the fact that the witness did not have to testify, and apparently decided to proceed with the testimony even after 18 months had passed, would attenuate the illegal behavior. (Id. at 2-3.)

3. The role played by the illegally-obtained evidence in gaining the witness' cooperation. This criteria weighed against the state as the illegally obtained evidence led the police to the witness and was used to ensure the witness' cooperation. (Id. at 4.)

4. The willingness of the witness to testify. The trial court believed the testimony of the police officers:

> [T]hat there was no indication that [Champion] was to be charged unless he made a statement. Part of the reason I find that is -- find that way is because two weeks later when he had really no motivation whatever but, I guess,

trying to clear his conscience, Champion comes in and tells [the detectives] statements about what the defendant allegedly stated to him regarding the homicide case. That's one factor I'm considering.

Number two, the -- at the time this is occurring, the police officers had really no -- no evidence whatsoever or sufficient to arrest the Witness Champion for the robbery at La Quinta, had no probable cause.

And we have the witness -- the testimony of two witnesses, police officers, who indicated nothing of that nature was mentioned; that what in fact was mentioned was that it in fact he had been -- had not been the trigger man or the one with the gun, that he would not be charged.

Seems to me that that's a more plausible approach than saying when they didn't have probable cause to arrest "We're going to arrest you if you don't cooperate."

In addition, I considered the fact that apparently that was the first time such a statement had been raised by Mr. Champion, to-wit: That he had been threatened, although the case has been pending and apparently he has made statements to counsel and other folks prior to this time.

> And it seems to me that -- also, the pressures that he must feel at this point to be testifying against a person who was a friend, as he indicated, for approximately five years before this whole business occurred.

(Id. at 4-5.) The trial court then balanced the findings and concluded that under Hooton and Ceccolini, the costs of exclusion outweighed its benefit and denied the motion.

On appeal, appellant asserts not that the trial court erred in applying the wrong standard of law, but that its factual determination in reaching its conclusion was in error. The trial court's determinations were not clearly erroneous and should be affirmed.

First, concerning the finding that the police did not continue the interrogation to locate additional witnesses, as noted by the trial court, this is a unique factual setting where a murder is unsolved for over 2 years. The

detectives were summoned to take a confession from an individual who, until recently, had been engaged in abnormal psychiatric behavior. The confession proceeded until, due to the obvious physical discomfort of appellant, he requested that questioning cease. As the trial court noted, at that point in time, the police were unaware that appellant had supplied them with any information that was not available to the general public. This was not the first confession to this crime by an individual and, in order to ensure that they would not waste their time or detain appellant further on the basis of an erroneous confession, they pressed appellant about facts known to them that only the perpetrator would have known. While such action is improper police conduct, it was not designed to acquire a witness' testimony, and the trial court was

correct in finding this factor. In regards to the proximity between the illegal behavior and the witness' decision to cooperate and testify, the trial court correctly determined that this factor weighed for the state as the witness had had over 18 months to refuse to cooperate. The fact Mr. Champion cooperated in all interviews and actually contacted the police in regards to certain testimony indicates that he did want to testify. Concerning the role played by the illegally-obtained evidence in gaining the witness' cooperation, the trial court found it weighed against the state. However, Mr. Champion's decision to come forward and offer additional evidence to alleviate his conscience would mitigate this finding. Finally, the witness' willingness to testify was in dispute. The trial court, after evaluating all of the evidence, logically

held that Mr. Champion's actions indicated he was willing to testify, even though he began to digress when testifying in front of appellant. The trial court's finding was not in error.

APPENDIX F

TRANSCRIPT OF APPELLANT'S TAPED CONVERSATION

TRANSCRIPT OF APPELLANT'S

TAPED CONVERSATION

EG: Ed Gonzalez

FM: Frank Martinez

PL: Perry Lowe

A: Appellant

DET. FRANK MARTINEZ: ALEX, I'd like to introduce you to a couple of my friends, OK? This is MR. GONZALES, ED GONZALES.

EG How you doing, ALEX.

FM And this is MR. LOWE. They're both from the Tucson Police Department, they would like to speak to you, OK?

PL Is that all right. OK.

EG Thanks, FRANK.

PL Thank you FRANK. ALEX, like I aid, I'm a detective with Tucson Police epartment.

A Yes.

PL And we're down here because you alked to FRANK earlier. He advised you f your rights. You're aware of those ights? You know you have the right to emain silent. Do you want to talk to s?

A I already talked to him.

PL No. Do you want to talk to us bout it?

A That I shot that lady?

PL Yeah. Basically.

A I did.

PL OK, when did you do that, do you want to talk to us about that?

A Why bother? I did it.

PL You did it?

A Yeah.

PL Why did you do it?

A Cause I felt trapped and I shot her.

PL Do you want to talk though?

A I just did it, I . . . walked in there and did it. What else is there to be said?

PL How old were you at the time?

A Fifteen.

PL What? Were you going to school?

EG Where were you going?

A To Tucson High.

PL OK, what classes were you taking then, do you remember?

A I was taking business law. I forgot the rest.

PL OK, where were you living?

A With my mom.

PL What's her name?

A EVELYN BRAVO.

PL EVELYN BRAVO? OK, where does she live now?

A The same address that I gave that man.

PL What was that?

A 426 S. Westmoreland.

PL You felt trapped. What trapped you?

A She did. She . . . I told her to give me the money and she didn't . . . she came towards me and kept coming and I closed my eyes and I shot her. I shot her.

EG Where did you shoot her?

A I don't know. I didn't look.

PL You didn't look?

EG Did you tell Detective MARTINEZ that you had shot her in the head?

A I just shot her like that, boom.

PL How many times?

A Twice, I think.

PL You think twice? Who was with you?

A I was by myself.

PL You were by yourself? What time was it?

A It was in the morning. Early in the morning.

PL Early in the morning?

A About nine or something like that.

PL Was it between classes? Do you remember what class you came from?

EG I can't hear you.

A No.

EG No?

PL Where did you get the gun?

A I stole it.

PL Where did you steal it from?

A From the Desert Inn.

PL From the Desert Inn?

EG From a car or from a room?

A From a room.

EG You broke into a room?

A Uhmm.

EG Not an office?

A Uh-um.

EG Where was this lady at when you shot her, was in a house?

A It was in a store.

EG What kind of store?

A A food store.

EG What race was the lady?

A What race was she?

EG Yes. Was she white, was she black?

A I think she was white.

EG You're not sure?

PL OK, how long before you shot her did you get the gun?

A About three weeks.

PL A couple of weeks?

A Uhmm.

PL How do you remember what day it was?

A Cause it was advertised.

PL It was advertised? You read about it?

EG Was that yes or no?

A Yes.

EG Where did you read about it?

A In the news, I heard about it in the news and . . . stuff like that. On TV.

EG Where was this store near?

A It's close to the Tucson High.

EG Was it on the corner, was it in the middle of the block?

A It was on the corner.

EG What corner, do you remember? You shaked your head no?

A No.

EG Could the lady have been black?

A I don't remember.

EG Could she have been Mexican?

A She could've been Mexican.

EG Could she have been Chinese?

A She could've been Chinese.

PL What . . . did she say anything to you?

A She just nodded her head and came towards me like she was gonna do something to me.

PL When you first saw her, where was she?

A She was in the back of the store. And then she came up to the front.

PL When you saw the back of the store, was that a different part of the store, or was it all . . .

A It was in the back of the store, she was watching TV in the back of the store.

PL Did you tell her to come out there?

A She came out.

EG When you walked in, she came out? And then what did you do, did you pull the gun on her?

A Uhmm.

EG And what did you tell her?

A "Put the money in a bag." She didn't and she . . . I walked back like that, I was gonna run and I was trapped and she came towards me. And I shot her.

PL Was there a counter or anything there that you go up and pay, a cash regis . . .

A She had a counter, there was a counter, yeah.

PL Did she come out from behind the counter?

A Yeah. And then she went back to the counter.

PL When did she go back to the counter?

A When I put the gun in the air. And shot then.

PL Did she go behind the counter after you shot or before you shot?

A Before I shot.

PL Do you remember if she was standing close to the cash register or . . .

A She started to come around. My nerves have been bothering me. I started getting all tensed up and . . .

PL Just relax.

A I can't, I can't, it's . . . I think it's something that they gave me or something. I started getting all . . . tightened up and . . .

PL What kind of medication have they been giving you?

A A little green pill and a little blue pill . . . or a little red pills. See, I can't . . . I can't stop that, it comes and goes. It usually comes around this time and I start getting like this. I can't eat nothing, I just . . . my nerves just start tightening up. It's . . . I try to come up like this but I can't.

EG OK, well, you know, you don't appear to be too bad so just kind of, you know, relax.

A I can't.

EG You don't mind us asking you these questions, do you? Was that yes or no?

A No.

EG Do you know what you're saying to us, don't you? Yes or no?

A Yes.

EG You know what questions we're asking you, you know what the questions mean, don't you?

A Yes.

EG Is there anything that we've asked you so far that you don't understand?

A No.

EG Do you remember what this lady was wearing?

A No.

EG Can I ask you something, ALEX?

A What?

EG Why did you tell Detective MARTINEZ about it, it's been a while, why did you tell him about it today?

A I just did.

EG Do you know why you did?

A No . . .

EG Did you tell anybody else . . . have you ever told anybody else about what you did?

PL You didn't even tell your mother?

EG You're shaking your head no?

A No.

EG Did you ever tell any of your friends?

A No.

EG Who were some of your friends that you used to hang around with in Tucson?

A Just friends.

EG Can you give me some names?

A Oh, ANDY CARROLL, (ph) and SCOTT OWENS, (ph) and EVA (ph) and ERNIE and PETE (ph) . . .

EG ERNIE who?

A ERNIE HOLLINGSWORTH. (ph)

EG PETE who?

A PETE (inaud) and . . . I can't help this . . . (inaud)

EG It's OK, there's nothing to get all . . . there does not appear to be anything wrong with you, you're fine. So if you're worried about what we're thinking don't worry about it, you look fine to us.

A Well, I don't wanna answer anymore questions.

[The remaining conversation was suppressed by the trial court.]

EG What's that?

A I already said what I could.

PL Do you know RICKY GERMANY? (ph)

A Uhmm. I'm not his friend though.

PL Why aren't you his friend?

A Because . . . he doesn't like me.

PL When did he stop liking you?

A When we started fighting.

PL When was that?

A I don't remember.

PL That was after the shooting or before the shooting?

A After the shooting. (inaud) No more questions (inaud) . . .

PL OK, just relax.

A I can't. (inaud) With that stuff.

PL Can you lean back?

A No.

PL Stretch it out. What did you do with the gun?

A I sold it.

PL Who did you sell it to?

A To some guy, I don't know who he is. I just (inaud) but I don't know who he is. He just wanted to buy it so I sold it to him to get rid of it.

EG Did you get any money from the robbery?

A A little bit.

EG Where did you get the money from?

A From the cashier register.

EG The lady didn't hand it to you, did she? Did you take it after you shot her? You're shaking your head yes?

A Yes.

EG About how much was it?

A I don't remember.

EG Well, was it a hundred dollars or less?

A About a hundred dollars or less.

EG Fifty dollars?

A About a hundred.

PL Did anybody ever see you with the gun?

A No . . . just . . . just when I sold it to him.

PL You said you sold it to HOLLINGSWORTH?

A No, not him. I just said that cause the name just popped in my head. I just sold the gun to somebody who wanted to buy it.

PL When did you do that, how long after that?

A About a week after. See, it's starting . . . started up again.

PL Are they treating you okay here?

A Yes.

PL Have you ever been in jail before?

A Juvenile.

PL Juvenile? Do you know why you're in jail here now?

A Yeah.

PL Why?

A Taking a cop car.

PL Taking a cop car?

A Yeah.

PL You felt like doing that?

A Yeah.

PL How did you get to Benson?

A I hopped a train.

PL You hopped on a train and got off in . . .

A Yeah.

PL . . . Benson?

A Uhmm. The train stopped in Benson.

EG Where were you going?

A Out to California, I was supposed to be but I was going the wrong way.

PL Do you know MARIO VALENZUELA? MARIO?

A No.

PL TONY URIAS?

A Uh-um. I think I know him.

PL OK, the night before the old lady was shot . . .

A I don't remember what happened.

PL You don't remember what happened? Do you remember being over at La Quinta and robbing a man there?

A No. I didn't do that.

PL You didn't do that?

A Uh-um.

PL What if I told you the same gun tht was used in the La Quinta shooting was the same gun that shot the old lady?

A What's La Quinta?

EG It's that motel over there at St. Mary's and the freeway. Next to the Denney's.

A I don't remember that.

PL What kind of gun was it?

A 38 Special.

PL A revolver or an automatic?

A Automatic.

PL Do you know the difference in an automatic and a revolver?

EG You don't, do you?

A No.

PL Did you ever put any bullets in the gun that you stole?

A No. They were there already.

PL How do you know they were there?

A They were in there.

PL Was the gun round or flat?

A It was round. And I did . . . yeah, that's who I sold it to, this HOLLINGSWORTH.

PL What's his first name?

A SERGIO.

PL SERGIO?

A SERGIO.

EG SERGIO.

PL Where does SERGIO live?

A Near Menlo Park.

PL How old is SERGIO?

A He's 20.

PL He's 20 now?

A Yes.

PL Do you know what he did with the gun?

A No.

PL How do you know it was a 38 Special?

A I read it (inaud).

PL Pardon?

A I read it.

PL On the gun?

A (??)

PL You're looking good now.

EG Can we still ask you some questions?

A Well, what do you wanna know?

PL I'd kind of like to know about the night before you did this?

A The night before?

PL Yeah.

A I don't remember the night before.

PL Why don't you remember?

A I don't remember. Why would I remember the night before?

PL Because you should remember everything before or after. A time period that . . .

A I guess I do.

PL You think you do?

A Because I was in La Quinta too. I did that too.

EG Tell us about it, tell us how you did that one.

A I walked up there and asked the man for his wallet, and he resisted and I told him to lay on the floor. He laid on the floor and I tried to knock him out and the gun shot off.

EG Where did it hit him?

A I don't know, I didn't look. I ran once the gun went off.

EG OK, were you inside the room or were you . . .

A Outside.

EG Outside? Who was with you?

A DANNY CHAMPION.

PL DANNY CHAMPION?

A Yeah.

PL Where does DANNY live?

A In Menlo Park.

PL How old was DANNY then?

A Same as mine age.

PL You're both the same age? OK, did he go to Tucson High too?

A I don't know.

PL Was DANNY with you both times?

A Just once. He didn't do nothing. He was just with me.

PL Who took the wallet from the man?

A I did.

PL How much money did he have in the wallet?

A He had none, he had just credit cards.

PL Just credit cards?

A Yeah.

PL After you hit him and ran, which way did you run?

A Down towards the park, Menlo Park.

PL Did you go right down to the river or go across the bridge?

A I went in the river.

PL How far down the river did you run?

A Right out to the . . . that hole. Then I went in through the hole, went out then went home.

PL You didn't get any money from the guy at the La Quinta? Is that the reason you went over to the store?

A The store?

PL Yeah.

EG The next day.

PL The next day?

A Yeah. Was that the next day? Yeah, (inaud).

PL Do you remember what time of day it was at the La Quinta?

A It was at night. About eight o'clock at night.

EG Where was the man when you first met him, the one at La Quinta, was he in his room, was he outside?

A He was outside.

EG What was he doing?

A He was . . . he was putting something in his car.

EG What kind of a car was it?

A It was a truck, I guess, I don't remember.

EG It was a truck?

A I guess.

PL Did you see anybody that you know when you ran away?

A No.

PL Do you know RICHARD MORENO?

A No, I don't remember.

PL You don't remember RICHARD MORENO?

A No. I don't remember nothing else.

PL Were you doing any drugs?

A Uh-um. I was a little drunk.

PL You were a little drunk? Which time?

A Both times.

PL Both times? What had you been drinking?

A I don't remember.

PL Sniffing any glue? Did you ever sniff glue? You're shaking your head, that's yes?

A Yes.

EG Do you remember what some of the credit cards were that you took from this man at La Quinta?

A No.

EG Did you ever use any of the credit cards?

A No.

EG No money, not even a little bit of money in the wallet?

A Nothing.

PL When did you look inside the wallet?

A After . . . when we got up to the hole.

EG The hole. What's the hole?

A Near Menlo Park there's a big area, they fixed it now. There was a hole.

EG What color was the wallet?

A I guess it was black.

EG Did it have the man's driver's license in it?

A Yes.

EG Did it have any other type of license in it?

A He had just credit cards, that's all I remember. Just cards.

EG Do you remember what kind of truck it was that . . .

A No. I don't remember nothing else.

EG DANNY CHAMPION was with you?

A Yes.

EG Did you guys go over there specifically to rob somebody?

A Yes.

EG Who's . . . who's plan was that?

A Mine.

PL Then DANNY saw you with the gun?

A Yes.

EG Did you tell DANNY later on that you had also shot the lady at the store?

A No.

EG But he knows you shot the guy at La Quinta?

A Yeah. I don't remember shooting him. I just remember the gun going off. By accident it went off. Cause it was cocked back.

PL You look good.

A For right now. That's all I can say.

PL Why did you start talking about this to begin with, why did you start telling . . .

A Cause. I don't wanna live with that.

EG Cause it bothered you?

A Yes. It was (inaud). I didn't feel right about it. I gotta get something for this man.

PL OK, OK. I'll tell Detective MARTINEZ, he will take care of you, OK? Just relax.

(Record on Appeal, Exhibit No. 2, at Evidentiary Hearing.)

8169d/8227d jd